228 L34

CASES

ARGUED and DETERMINED

IN THE

High Court of Chancery,

IN THE TIME OF

LORD CHANCELLOR HARDWICKE,

FROM THE YEAR 1746-7, TO 1755.

WITH TABLES, NOTES, AND REFERENCES.

THE THIRD EDITION,

REVISED AND AMENDED, WITH SEVERAL ADDITIONAL NOTES AND REFERENCES, BY THE ORIGINAL REPORTER,

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ONE OF THE MASTERS IN THE HIGH COURT OF CHANCERY OF IRELAND.

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A

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CASES

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ARGUED AND DETERMINED

IN THE TIME OF

LORD CHANCELLOR *Hardwicke.*

Lee *verſus* D'Aranda, *Hilary* Vacation 1746-7.

THE huſband covenanted by articles precedent to his marriage, to leave the wife by deed or will 1000*l.* at his death, if ſhe ſurvived him; or that his executors ſhould pay it to her within ſix months afterwards: he died inteſtate; and the queſtion was, whether ſhe was intitled to her diſtributive ſhare of his perſonal eſtate, and alſo to 1000*l.* out of it? 3 Atk. 419. S. C. 1 Brown 63. 2 Brown 95.

Lord Chancellor decreed, that if her ſhare of the perſonal eſtate was of equal value to, or exceeded 1000*l.* it ſhould be a ſatisfaction, and ſhe ſhould not come in firſt as a creditor for that ſum, and then for a moiety of the ſurplus: On the authority of *Blandy* v. *Wilmore*, 2 *Ver.* 709, 1 *P. Williams* 324, which was a direct caſe in point, and alſo on the reaſon of the thing. For when huſbands create debts of this kind, the intention is, that ſhe ſhould have it without regarding the manner how; and the Court leans againſt double ſatisfactions. Indeed where by agreement of parties the debt is made in the huſband's life, then it muſt take place, and if unſatisfied, at his death, is a breach; like the caſe of *Oliver* v. *Brighouſe*, at the *Rolls*, *December 1ſt*, 1732, where the huſband covenanted to pay a ſum within two years after marriage; and if he died, his executors ſhould pay; he lived after the two years, and Poſt. 519. *Barret* verſus *Beckford*, *July* 1750.

(2) died leaving a larger ſum. But here there was no pretence of a breach in the huſband's life; there was no obligation on him to pay it; nor could an action at law, or bill in equity lie for it; which makes it differ from that caſe, where the covenant was not performed in his life; there is no difference, whether the huſband covenants to leave, or that the executors ſhall pay; for determinations muſt not be made in this court on ſuch minute circumſtances. In taking an account therefore of the perſonal eſtate, this 1000*l.* is not to be brought in as a debt.

A caſe on Mr. *Parſons*'s will was cited at the bar, where the queſtion was, whether an orphanage ſhare ſhould be a performance of a covenant to pay? and it was held that it ſhould not; becauſe not in the father's power; from whence it was urged that in the preſent caſe it was a performance, becauſe in the huſband's power.

Caſe 2. Scot *verſus* Merray, *Hil.* Vac. 1746-7.

LESSEE for years of the mortgaged premiſes agreed on the purchaſe of the mortgage for leſs than the original mortgage money, they being much decreaſed in value, and a guinea was paid in part, not as earneſt; and he alſo bought in the equity of redemption: but before the agreement was fully executed, the plaintiff intervenes, and by offering the mortgagees ſomewhat more, takes the bargain out of his hands, and brought this bill to compel him to redeem on payment of the whole mortgage money, or be foreclоſed.

It appeared clearly that the plaintiff had notice of the former agreement, nor was the want of notice charged in the bill; and on the plaintiff's counſel objecting to the reading evidence of the agreement till proved to be out of the ſtatute of frauds, it was anſwered that the ſtatute of frauds, was not applicable to this caſe; for the court here is to conſider on circumſtances, whether the plaintiff is a purchaſer *bonâ vel mal fide*; and *Richards* v. *Sims* was cited where ſuch evidence was allowed to prove a debt diſcharged.

Lord Chancellor ordered it to be read, as it would let the court into thoſe circumſtances; and ſeeming to incline that the plaintiff, being a purchaſer *malâ fide*, ſhould have only what he actually paid, he agreed to accept it.

Cart

Cart *verſus* Ball, *Eaſter* Term 1747. Caſe 3.

THE bill was brought by the plaintiff as adminiſtrator of his brother late vicar of *H.* for arrears of tithes in kind, due during the vicar's incumbency. The defence made was, that the vicar was never endowed; and that there was a yearly compoſition by way of *Modus* of ſeventeen ſhillings in lieu of all manner of tithes, which the defendants attempted to prove by receipts of former vicars, and evidence that tithes in kind were not paid within the memory of man. The plaintiff was obliged to prove the endowment, as his brother was only vicar and not rector, which he offered to do by producing a grant in the year 1209, by the *abbot* and *convent* of *Lyra* in *Normandy*, to the vicar of this pariſh, as evidence of endowment of all manner of tithes: but it was not ſuffered to be read, as it was not ſhewn to have come out of that monaſtery. The plaintiff next produced three terriers: the firſt of which was in 1638, the reading of which was allowed as being evidence, though not concluſive: it never was diſputed in the *Exchequer*, and even the parſon's books have been read.

LORD CHANCELLOR.

This is a very unuſual demand: the queſtion is, if the plaintiff has ſhewn an original right in the vicar, to the payment of tithes in kind, and if the *Modus* be a ſufficient bar thereto? The *Modus*, as ſtated by the anſwer, is not ſufficiently laid even in point of law, nor is it ſufficiently proved: the firſt objection thereto is, that no time of payment is ſhewn, that was formerly neceſſary in the *Exchequer*; but that court has ſince very juſtly departed from that rule; however, the ſaying it was to be paid yearly, is too uncertain: but the principal ground of the inſufficiency of the *Modus* is, that it is not ſaid by whom to be paid; which is neceſſary, in order to ſhew againſt whom the parſon has remedy for that cuſtomary payment. Then conſidering it upon the evidence, there is no proof of an entire *Modus* of 17*s.* but only that it was paid ſeparately and by contribution; nor do the receipts import a *Modus*. But as to the plaintiff's demand, this caſe ſtands in a different light; here is no evidence of payment of tithes in kind, which is more material in the caſe of a vicar than of a rector, who is of common right intitled to tithes; and non-payment cannot be alledged by preſcription againſt him:

Poſt. *Richards* ver. *Evans* and *Mitchel* ver. *Neal* 8. *Nov.* 1755.

but a vicar, being intitled to payment of tithes in kind againſt common right, muſt ſhew an endowment either actual or by collateral evidence of ſuch uſage; of which there is none here. The uſage of this pariſh ſhews, there muſt have been ſome ſubſequent endowment; but as the original thereof cannot be read, the court muſt take it on the evidence produced, which does not prove that tithes in kind were ever paid; for the terriers are dark, and do not (4) import ſuch payment, and I much queſtion, whether there is any inſtance of a decree for ſuch payment, where there is no evidence of it, though there might be in the caſe of a rector; therefore though the *Modus* is inſufficient, there is ſufficient in the defendant's anſwer to intitle him to object to the plaintiff's right; which he not having proved, he cannot have a *decree:* nor yet ſhould his bill be diſmiſſed, but ſome other way for relief be found. Let an iſſue be directed to try whether the vicar was in his life intitled to the payment of tithes in kind.

The plaintiff had time and opportunity given him to eſtabliſh this ancient endowment, and to examine it by commiſſion, which was not executed: the jury found, that the vicar in his life was not intitled to theſe tithes in kind; and the bill was July 17th 1749 diſmiſſed with coſts at law, but not in this court.

But *Lord Chancellor* then ſaid, That as to the *Modus* which is admitted by the anſwer, the plaintiff is intitled to the arrears thereof, during his brother's life; notwithſtanding the objection taken by the defendant that the bill was barely for tithes in kind, and the plaintiff himſelf inſiſted that the *Modus* was not good. An iſſue could not properly be directed on the *Modus*, becauſe that would be admitting ſome kind of endowment or other, and excluding the other point; ſuch an iſſue therefore was directed as would take in both. It often happens both in the eccleſiaſtical court and court of exchequer, that on the diſmiſſing a bill brought barely for tithes in kind, the plaintiff may yet have a *decree* for a *Modus* admitted by the defendant's anſwer; and it is the ſame in this court, ſince it is a good *Modus* in its nature, and only imperfectly ſet forth in the anſwer, in not alledging that it was payable by the occupiers of the land; though there might be more in it if it was not good in its nature.

Elton

Elton *verſus* Elton, *Eaſter Term* 1747. Caſe 4.

Deviſe of 1500*l.* to a grand-daughter to be at her own diſpoſal, if ſhe married with conſent of her father and mother, or truſtees, and not otherwiſe. She dies at 13, inteſtate and unmarried; it is not veſted nor tranſmiſſible. Legacy to one on her attaining the age of 28, or marrying with conſent. Deviſee died before ſhe attained 28, having married without conſent. Legacy held not to veſt; 1 Brown, 304. In. 2 Atk. 184, ſuch a deviſe was held to be in terrorem, and that it veſted on marriage, one of the contingencies happened, but Lord Loughborough doubted the authority of that caſe. In Prec. Chan. 562, ſuch a deviſe was held only to be in terrorem, and to veſt, notwithſtanding marriage without conſent, there being no limitation over.

A Power was reſerved under a marriage ſettlement to *Elizabeth Elton* (the plaintiff's ſiſter) of diſpoſing of 1500*l.* as ſhe pleaſed to direct, if ſhe died without iſſue by her then huſband; and if ſhe did not diſpoſe of it, it was to go to Sir *A. Elton* her father. She died without iſſue, and without any directions: Sir *A. Elton*, thus intitled to it, made a will, wherein he ſays, that in purſuance of his daughter's requeſt he gives this 1500*l.* to *Hannah Elton* (the plaintiff's daughter) to be at her own diſpoſal, if ſhe married with conſent of father and mother, or their truſtees if they died before, and not otherwiſe. She died at the age of thirteen, inteſtate and unmarried; her father as her adminiſtrator brings this bill claiming the 1500*l.* as an intereſt veſted, and conſequently tranſmiſſible.

For the Plaintiff. The caſe of *Peyton* v. *Bury*, 2 *Will.* 626, ſhews, that this could not be a condition precedent; for then it is uncertain, whether it would veſt during the life of *Hannah Elton*, which could not be the intent; nor is it agreeable to the words, which give it her at her own diſpoſal, and is inconſiſtent with the ſuppoſition of its not being due till marriage, which would put it out of her diſpoſal: the natural conſtruction therefore is as a condition, which would determine her intereſt on a breach; which never happening, by the act of God, the gift is become abſolute: the words, *and not otherwiſe*, mean, that if ſhe marries otherwiſe, ſhe ſhall not have it, which is a condition ſubſequent; if therefore ſhe does not marry contrary, ſhe ſhall not be deprived of it. A prudential marriage was the teſtator's object, and not marriage only, as the defendant inſiſts; the court will rather lean to veſt the legacy, and uſes a latitude in the conſtruction of conditions precedent or ſubſequent; for which no technical form of words is required: but ſuppoſing the words mean, ſhe ſhall not have it if ſhe does not marry with conſent; it is clearly a condition *in terrorem*, which is not allowed in reſtraint of marriage, either in the *civil* or our law. In the caſe of

(5)

Ward

Ward v. *Trig* in the *Exchequer*, *Eaſter* term 1746, a father gave his daughter 400*l.* if ſhe married with her mother's conſent; if otherwiſe, then to fall into the reſidue: the daughter died long after her attaining her full age, and gave it to the plaintiff, and that court thought it a veſted legacy, and that ſhe had power to diſpoſe of it. It was ſo likewiſe held in *Aſton* ver. *Aſton*. 2 *Ver.* 452.

For the Defendant. A marriage in fact was neceſſary; ſo that never having veſted, it falls into the eſtate of Sir *A. Elton* the grand-father, which is undiſpoſed of. In *Atkins* ver. *Hiccocks*, 739, one deviſed 200*l.* to his daughter to be paid at her time of marriage, provided ſhe married with conſent: ſhe lived till after the age of 21, but died unmarried; it was adjudged, that the legacy never veſted, becauſe there was no marriage. So it was held at the Rolls in *Garbert* v. *Hilton*, *Nov.* 26*th*, 1739, where a legacy was given to the plaintiff, provided ſhe married with conſent of her father and mother, or the ſurvivor of them: ſhe brought a bill to have it raiſed, which was diſmiſſed; ſhe not being intitled thereto before marriage, which was neceſſary, though conſent was not.

LORD CHANCELLOR.

This is a very ſtrong caſe againſt the plaintiff, it was a gift moving from the bounty of the grandfather; for it was his own, though he recites as diſpoſing it purſuant to requeſt. The queſtion, whether it was veſted at the death of *Hannah Elton*, depends on the conſtruction of the clauſe in the will, and on authorities: and it is clear from the (6) words, that it is a condition precedent to the veſting; or at leaſt a time or event when to be paid, and therefore no difference whether precedent or ſubſequent, but it cannot be ſubſequent; becauſe the money was to be given her upon her marriage; and if the words are tranſpoſed, ſtill that time or event is annexed to the body or ſubſtance of the legacy. The *civil* law does not admit the difference between conditions precedent and ſubſequent, for there it is all void. But both this court and the civil law requires a marriage to be had in all thoſe caſes; for the ſubſtance muſt be performed, taking it as a condition or event of payment, for *dies incertus facit conditionem*, and where the time of payment is certain, it is tranſmiſſible to the executor although the legatee dies before; but where the time or event is uncertain, the teſtator muſt have had that in view. Nor is there any inference to be drawn from the words *to be at her own diſpoſal*; for it may be a queſtion, whether thoſe words do not mean to her ſeparate uſe; but without

Cray v. *Willis*, 2 *Will.* 531. and 528, 628.

without entering into that it might be ſo ſtipulated upon her marriage; the conſtruction of the words *and not otherwiſe*, according to the meaning inſiſted on for the plaintiff, would apply them to part only, *viz.* the conſent and approbation. *Atkins* v. *Hiccocks* was determined on the ſame foundation, but this is ſtronger; there it was a portion given by a father: which caſe the court diſtinguiſhes, he being bound from nature to provide for a child, and will make as ſtrict a conſtruction as poſſible to comply therewith, and will decree a ſurrender of a copyhold to be made good: but not ſo in the caſe of a grandfather, where it is merely a bounty; and in that caſe it was an annuity given in the mean time, the daughter being intitled to the intereſt, and therefore there was ſome reaſon to think the legacy veſted. But it is otherwiſe here, for the court will not give intereſt to a grand-daughter in the mean time; which is an anſwer to the objection that ſhe might wait ſeveral years before it might veſt: and if ſhe had brought a bill immediately upon the death of the grandfather, the court would not have decreed it for her. Abſtracted therefore from other circumſtances, the plaintiff is not intitled; but from the whole frame of the will, this conſtruction was the intent of the teſtator, *viz.* to advance her in marriage.

Welford verſus *Beezely*, *May* 23, 1747. Caſe 3.

THIS caſe came before the court on three bills, the firſt by the wife of *John Welford* againſt her mother, making her huſband co-defendant for a portion of 1000*l.* and intereſt; which was by the plaintiff's marriage articles to be ſettled to her ſeparate uſe with the intereſt; if the huſband ſurvived her, then to go to him, if ſhe did not diſpoſe of it. *December* 11*th*, 1745, the Maſter of the Rolls decreed the mother to lay out 1000*l.* on the truſt in the marriage articles, and pay it to the plaintiff her daughter with coſts, and an account of what was due for intereſt. The ſecond bill was brought a great while afterward by the mother againſt both her daughter and the huſband and truſtee, to have an account of a partnerſhip in trade entered into between her and *John Welford* her ſon-in-law, upon ſuggeſtion that ſhe had made ſatisfaction for that 1000*l.* by allowing him credit for ſo much for part of his ſhare in the ſtock, which he was obliged to put in, and ſhould therefore indemnify her. The third bill was by the huſband alone againſt his mother-in-law, and *J. B.* her ſon, the other partner, to have an account of the ſtock and trade; the original cauſe was afterwards reheard, and the other

other two cauſes came on at the ſame time in *June* 1716, before the Maſter of the Rolls; who affirmed his *decree*, directed an inquiry into the partnerſhip and an account.

On theſe two *decrees* it came now before *Lord Chancellor*, who ſaid, the great difficulty attending the complete juſtice of this caſe ariſes from the great dexterity uſed in ſplitting and dividing it on one hand, and the unſkilful defence made on the other. The firſt general queſtion ariſing on the firſt *decree* is, whether the *defendant* the mother, on the foot of theſe articles ſhould pay 1000*l.* with intereſt to her daughter? on the other *decree* the ſecond queſtion is, whether the defendant *John Welford* muſt be conſidered as having received ſatisfaction for that 1000*l.* as paid to him, and ſhould indemnify the mother? The firſt queſtion depends on theſe conſiderations. Firſt, whether the mother is proved to have known and agreed to theſe marriage articles; and if ſo, whether ſhe ought to be bound on the foot of the ſtatute of frauds. I am of opinion, that it is plain, that ſhe knew of, and agreed to them; ſhe admits her knowing of the treaty, and that ſhe agreed to give 1000*l.* portion to be ſettled to the ſeparate uſe of the wife, and that ſhe was privy and conſented to the actual marriage which took place ſoon after; being prevailed on by his being repreſented to be in good circumſtances. It is true, that ſhe was not a party; and it is therefore inſiſted, that her ſigning as a ſubſcribing witneſs, was not with an intent to be bound or to know the contents; and I do not think, that the bare atteſting a deed as a witneſs will create ſuch a preſumption of his knowledge of the contents, as to affect him with any fraud therein; for a witneſs is only to authenticate it, and not to be preſumed privy to the contents: but that is not the preſent caſe, for her knowing the contents is proved here, from undeniable evidence, and ſtill ſtronger from the circumſtances of the caſe: this being ſuppoſed, the next conſideration is on the ſtatute of frauds; whether ſigning as a witneſs is a ſufficient ſigning within that ſtatute to bind her? It is urged as very ſtrange, that ſhe, from whom the money was to move, was not made party; and that is certainly very odd: but there is no evidence, that ſhe was aſked and declined it, and perhaps they thought her knowledge and atteſtation was ſufficient; and ſo it is even within the words of the ſtatute, the meaning of which was to reduce contracts to certainty, and to prevent fraud. Even in courts of law, where the circumſtances of the ſtatute have been materially complied with, form has not been inſiſted upon; and ſigning as party, means a perſon being bound thereby:

The bare atteſting a deed as a witneſs will not create a preſumption of knowledge of the contents, ſo as to affect with any fraud. But if there is knowledge of the contents, ſigning as a witneſs is a ſufficient ſigning within the ſtatute of frauds to bind, tho' not a party thereto.

or

or elſe what would become of the *decrees* in this court founded on letters; where though the perſon did not intend to be bound, the court would bind him: and even a letter ſent to an agent has been underſtood as a ſufficient ſigning within the ſtatute; for ſigning is all that is neceſſary. The caſe of *Bawds* v. *Amhurſt*, in *Chan. Prec.* 403, cited for the defendant, is no impeachment of this doctrine, for there was no ſigning, and ſo undoubtedly could not be a good agreement; for where it is only a ſketch or draft, and not completed by ſigning, though it is all in the party's own hand-writing, it is not good: but this is complete, and not merely a draft. I will go further, and if it was not ſo ſtrong, would carry it into execution on the foot of the fraud; as in the caſe of *Mallet* v. *Halfpenny*, *Chan. Prec.* 403, 2 *Ver.* 373. it is therefore ſufficient to bind her, ſuppoſing ſhe knew not the contents. The daughter is as much a purchaſer for valuable conſideration as her huſband, and perhaps would not have conſented to the match, but on thoſe terms: but there is another circumſtance in this caſe, which would be ſufficient for the plaintiff, *viz.* that ſhe has notice of the truſt declared on this 1000*l.* whereby it became truſt money; and conſequently ſhe is bound and affected as the perſon in whoſe hands the fund is, for this particular purpoſe: upon a general truſt indeed the truſtee is only bound to ſee to an application.

As to the ſecond queſtion, whether *John Welford* the huſband ſhould indemnify the mother, I think it ſufficiently appears by the evidence, that credit was given to the huſband for this 1000*l.* in admitting him into the partnerſhip, and that it was ſo meant by the agreement between him and the mother; and unleſs this is looked on as an allowance of it to him, there is no other way of accounting for the long delay of any demand, though intereſt was payable immediately: if then really brought into that partnerſhip (though it would not bind the wife, unleſs ſhe conſented, which does not appear) it is equal to an actual payment, for he has the ſame benefit, and if it appeared immediately what that particular ſtock was, I would decree him immediately to indemnify the mother; both being affected with the truſt, and ſhe paying the whole truſt money to him: but as he objects, that no account was taken of the ſtock, till when the value does not appear, it would be too hard to decree him to indemnify her, when it may happen on the account taken, that he has not received ſatisfaction for it; though there is ſtrong probability, that he has. But to make her ſafe in all events, he ſhall

pay

pay into the bank whatever ſhe ſhall be obliged to pay the daughter, indemnify her to the extent of what he has received, and abide by the account.

(9)

Whelpdale verſus *Cookſon*, *Eaſter* Term 1747.

Caſe 6.

ON deviſe of lands in truſt for payment of debts, the truſtee himſelf purchaſes part.

Truſtee not to purchaſe part himſelf.

Lord Chancellor ſaid, he would not allow it to ſtand good, although another perſon being the beſt bidder bought it for him at a publick ſale; for he knew the dangerous conſequence: nor is it enough for the truſtee to ſay, you cannot prove any fraud, as it is in his own power to conceal it; but if the majority of the creditors agreed to allow it, he ſhould not be afraid of making the precedent.

Caſe 7.
Poſt. 133, 154.

Flanders verſus *Clark*, *Eaſter* Term 1747.

Where the 1ſt taker of a perſonal legacy had the abſolute property, and not to go over.

Margaret Flanders by a clauſe in her will gave 150*l.* to her ſon, the principal to be paid by her executors at ſuch time and proportions as they pleaſe; but that he ſhould not diſpoſe of it to any preſent or future wife; but if he died without iſſue, then it ſhould revert to the teſtatrix's family, and intereſt, at the rate of 5 *per cent.* to be paid by the executors for what ſhould be in their hands till the whole be paid. The ſurviving executor directs it to be paid after a certain time to the ſon with intereſt; which time was now expired. (a)

It was inſiſted, that he ſhould have no more than an eſtate for life in it, and not veſted immediately, but the payment ſuſpended till his dying without leaving iſſue at his death; which as it is perſonal eſtate, muſt be the conſtruction of the words. Then the contingency is good, on which it was to revert to the teſtatrix's family; nor has the power been executed in fact, for it ſhould have been by both executors, and an execution by one, though the ſurvivor, is not ſufficient.

LORD CHANCELLOR.

The penning of this is particular, ſo that it cannot be determined on any general rule, but on particular circumſtances. If the clauſe had reſted on the firſt part, I ſhould have thought it ſhould go to him as an uſufructuary intereſt

(a) Bequeſt to one, and *in caſe of her deceaſe* over, deviſee takes only for life. 1 Brown, 393. Perſonal legacy to *A* after the death of *B.* without lawful iſſue, held too remote, and the whole veſts in *B.* 2 Brown, 33.

reſt during life only, and then over: but the conſtruction muſt alſo be on the other part of the clauſe, directing the executor to pay intereſt till the whole was paid; which ſhews, the teſtatrix meant it for his perſonal benefit: but ſhe had a view that he might die, before he made uſe of it, and therefore that he ſhould not diſpoſe of it from her family. It may be objected, that payment by the executors meant by way of loan, but then the executors muſt have taken ſecurity from him; which ſhe did not mean he ſhould give. I doubt of the rule inſiſted on, that one executor cannot execute in this caſe; for the power is given to the executor of the perſonal eſtate, as executor; and there is no caſe where one executor's death determines the execution: and if that ſurviving executor had not diſpoſed of it, it would have devolved on the court to have done it. In the caſe of the *Attorney General*, at the relation of the *Goldſmith's Company* v. *Hall*, which is well reported in a book, (though not of authority) called *Fitzgibbon's Reports*, the teſtator gave to his ſon his perſonal eſtate, and if he died without iſſue, then ſo much as ſhall remain, to the *Goldſmiths Company*: the ſon died with iſſue, and it was inſiſted, that he had only an uſufructuary intereſt, and ſo to go over: but it was determined by Lord *King*, that he had the abſolute property, and therefore the deviſe over was void; for he had power to ſpend the whole, which was an abſolute gift. The preſent caſe is ſtronger; for here he is now living, and therefore has the whole property agreeable to the intent of the teſtatrix.

(10)

2 Vol. 268.

Deviſe to Teſtator's wife, *not doubting* ſhe will give what is left to his grand-children, not ſufficiently certain to raiſe a truſt; 1 Brown, 179.

The legacy was decreed to him without any ſecurity.

Ridout verſus *Payne*, *May* 1747.

Caſe 8.

THE bill was brought by huſband and wife to be relieved againſt the conveyance of an eſtate, ſuggeſted to be ſettled contrary to the will of her former huſband, from whom it moved; who was ſeiſed of a perſonal, and alſo of a real eſtate, conſiſting in ſeveral parcels, upon part of which his wife had a jointure: and reciting the ſame not to be a ſufficient proviſion for her living hoſpitably, he deviſed other lands to her for life, remainder to his brother and heir at law; to whom alſo he deviſed other lands in tail, remainder to his right heirs; and then deviſed to his ſaid wife, whom he made executrix, all the reſt and remainder of his goods, chattels, and perſonal eſtate, together with his real eſtate not before deviſed.

Poſtea 223. 2 vol. 48.

Controverſies ariſing between the widow and the heir at law, they were referred to arbitrators, who made an award,

to

to which the parties agreed; in which no particular uſes were directed, but that the lands ſhould be ſettled according to the intent of the will, and conveyances were made to carry that award into execution. The bill was to have the conveyance rectified * as having limited ſome of the lands contrary to the intention of the will, *viz.* to the wife for life, remainder to the heir at law.

LORD CHANCELLOR.

The queſtion is, whether the plaintiff is intitled to this equity? which will depend on the true conſtruction of the will, and what eſtate and intereſt the plaintiff took thereby. Then ſuppoſing that is with her, whether the argument and ſubſequent deed will create any thing to bar her?

(11)

The firſt queſtion naturally divides itſelf into two others. The firſt relating to two parcels of land not taken notice of in the will, whether the reverſion of them paſſes by the reſiduary clauſe? which will admit of no diſpute. They plainly do paſs: the words *real eſtate* carrying land, and alſo the inheritance of that land, though accompanied with other words, as goods and chattels, *&c.* which is not contrary to *Marchant* v. *Twiſden*, *Eq. Ab.* 211; for there the intent was only to carry perſonal eſtate. And in the *Counteſs of Bridgwater* v. *Duke of Bolton*, well reported in a book of no great repute; 2 *Mod. Caſes* or 7 *Mod.* the words *real eſtate* will paſs not only the thing, but alſo the teſtator's intereſt therein. The ſecond queſtion is, whether the reverſion of the two other parcels, deviſed to the plaintiff for life, is included in the reſiduary clauſe? It is included; for the reverſion upon particular eſtates will paſs by the words, *lands*, *meſſuages*, *tenements*, *and hereditaments*, as in *Wheeler* v. *Walrond*, *Alleyn* 28, *Cheſter* v. *Cheſter*, and 2 *Ven.* 285. and ſeveral other caſes. The queſtion therefore is, whether there is any thing particular here, to take it out of this general rule? The firſt objection is taken from the teſtator's recital; whereby it ſeems, he intended a proviſion for her life only; but that is inferring too much; for the reſiduary clauſe had paſſed an eſtate of an inheritance to her before, as already mentioned. The ſecond objection is, that it is inconſiſtent for the teſtator to give her the ſame thing for life, and afterward abſolutely: and that the caſes above cited, were, where it was to ſeveral perſons. But when a will gives a particular

* Cowp. 808, 299, Prec. Chan. 202. 3 Wms. 56; 63. 3d. Atk. 486.

particular intereſt, and afterward a general intereſt, it has not been determined that the general gift ſhall be excluded. Suppoſe a gift to *A.* and his heirs, then to *B.* and his heirs; they ſhall be jointenants, the latter deviſe not revoking the former; notwithſtanding ſome old opinions to the contrary. In *Hopewel* v. *Ackland*, *Com.* 164. 1 *Sal.* And *Scot* v. *Albury*, *Com.* 337. the latter words carried the reverſion in fee of lands before given. Beſide there is a particular argument for the plaintiff, that the teſtator in other lands has limited them to his wife for life, remainder to her heir at law, and thereby pointed out what particular part of the inheritance ſhould go to him.

The ſecond queſtion is, whether this agreement ſtands in her way, as it is objected it ſhall, becauſe the parties are bound by the *award*; and that the court cannot intermeddle, for then there could be no compounding ſuits: for which is cited *Can.* v. *Conn.* 1 *Will.* 723, but that is not like this caſe; for ſuppoſe it depended on the award, if arbitrators are miſtaken in a matter of law, it is enough to ſet it aſide, 2 *Ver.* 705, and *Metcalf* v. *Ives*, *June* 18, 1737; but here they have awarded the eſtate to be ſettled to the uſes of the will, without ſpecifying any particular uſes: but the conveyance has limited them contrary to the will, and ſo contrary to the award. (12)

The plaintiff therefore is intitled to have it rectified.

City of London verſus *Naſh*, *May*, 1747. Caſe 9.

THE bill was brought to have a ſpecific performance of an agreement in a leaſe of ſome old houſes, made with *G. Graves* the original leſſee of the premiſes, which were now veſted in the defendant. The covenant was within three years to build brick meſſuages on the premiſes demiſed.

The defendant inſiſted, that he had ſatisfied the covenant by building in the plural number two houſes, and only repairing the reſt.

The firſt point was, as to the true intent and conſtruction of the covenant in the leaſe? The ſecond, whether it had been ſufficiently performed?

LORD CHANCELLOR.

As to the firſt, it was plainly intended to let on a building leaſe, which is for 61 years at leaſt; not on a repairing leaſe, which can only be for 21 years. The words *or any part thereof* were inſerted in the covenant in the draught, but

but rejected in the leaſe itſelf very properly, which ſhews, that the meaning of the covenant was that all the meſſuages ſhould be new-built: for an indefinite propoſition is equal to an univerſal one; and the whole ſeems to mean a building leaſe. If therefore an action at law had been brought upon this covenant, and a breach aſſigned; and *Graves* had pleaded performance by building only two new meſſuages, that plea would not be allowed. But this court has power to go further, and ſee what was the intent, ſuppoſing no leaſe had been executed: upon a bill for a ſpecific performance the court would decree the whole to be built; the leaſe appears not to have been made in a proper manner; for *Graves* did not take it for his own benefit, but as truſtee for the defendant to whom it was aſſigned for 5*l.* conſideration: and who was at the time one of the committee for letting the city lands; and his ſcheme plainly was to get a longer term upon repairing the houſes only.

As to the ſecond point, it has not been performed by *Graves* or the defendant; for though the houſes have been largely repaired and new fronted, *&c.* that is different from new building. The firſt defence made is, that the plaintiff ſhould not come here for a ſpecific performance, but be left to a court of law. But I am of an opinion, that upon a covenant to rebuild, the landlord may come here for a ſpecific performance; as the not building takes away his ſecurity: but upon a covenant to repair he may have damages at law. The moſt material objection for the defendant, and which has weight with me, is, that the (13) court is not obliged to decree a ſpecific performance, and will not, where it would be a hardſhip; as it would be here upon the defendant (ſuppoſing he meant an evaſion) to oblige him, after having very largely repaired the houſes, to pull them down and rebuild them; which would be to decree deſtruction, and would be a public loſs, and no benefit to the plaintiffs, who only want to be repaired in damages, which will be ſufficient ſatisfaction to them.

Let the parties therefore proceed to a trial at law, to ſee what damages the plaintiffs have ſuſtained.

Caſe 10. Haws *verſus* Haws, *Trinity* Term *July* 26, 1747.

Lands deviſed to 4 younger children equally ſhare and ſhare as tenants in common, and not as jointenants, with benefit of ſurvivorſhip, it referring to former ſurvivorſhip, is a tenancy in common, with a particular limitation over on a contingency to go to the ſurvivors. 3 Atk. 524, 1 Wms. 96. 2 Wms. 280. Supra 165. 3 Burr. 1881.

A. HAWS the plaintiff's grandfather made a will, and reciting that he was a freeman of *London*, deviſes ſo ſoon after his deceaſe as the children required, his cuſtomary

tomary part to his five children, equally to be divided between them, ſhare and ſhare alike, as tenants in common, and not as jointenants, with benefit of ſurvivorſhip. He then gave his teſtamentary part to his four younger children in the ſame words, with like benefit of ſurvivorſhip; and laſtly gave his real eſtate to his four younger children and their heirs, in the ſame words, with benefit of ſurvivorſhip. *H. Haws* his ſon, and the plaintiff's father, afterward deviſes his lands to a truſtee and his heirs on truſt to pay debts by ſale; and the reſidue unſold (or the whole, if the perſonal eſtate was ſufficient for ſuch payment) to his three children and their heirs, when he, ſhe, and they, attained the age of twenty-one or marriage, equally to be divided between them ſhare and ſhare alike, as tenants in common, and not as jointenants, with benefit of ſurvivorſhip; and directs the rents and profits to be for their maintenance and education during their minority. One of the three children died before full age or marriage. Two queſtions aroſe. Firſt, whether the words of theſe wills conſtitute a tenancy in common, or jointenancy? Secondly, what ſhall become of the deceaſed child's ſhare?

LORD CHANCELLOR.

On the general reaſoning and authorities, this caſe is clear or the plaintiff; but what weighs moſt with me, is the particular circumſtance of theſe wills, from the connection between the different clauſes. The firſt queſtion is, whether the four children take in jointenancy or in common, generally or attended with a particular limitation over on a contingency? It is true, that jointenancies are not favoured here; as introducing inconvenient eſtates, and making no proviſion for families: and now courts of law alſo lean againſt them; though formerly it was ſaid by *C. J. Holt*, that they were favoured, which was on a technical reaſon, becauſe the law was averſe to multiplication of tenures and ſervices; which being now reduced to *ſocage*, and no burthen, the conſtruction is the ſame in all courts. Other principles that have been drawn are alſo true, *viz.* that where the words of a will are inconſiſtent, the court muſt make a conſiſtent conſtruction, and to that end reject ſuch as appear to be leaſt conſiſtent with the intent; but not if it be poſſible, to make all conſiſtent. This is an immediate deviſe in fee, to all equally; which words in a will import a tenancy in common, if no more; but beſide, there are poſitive and affirmative words of a tenancy in common, and negative of jointenancy; which plain

plain and expreſs words ſhall not be overturned by the ſubſequent ambiguous words *with benefit of ſurvivorſhip* The queſtion then is, what conſtruction is to be put on them? Two conſtructions have been attempted: the firſt, as if they meant the ſame as *without benefit of ſurvivorſhip*, which in ſome caſes has been done, as *in and out of ſettlement* have been conſtrued the ſame; and it has been therefore argued, that they are only an explanation of what jointenancy is, and that the ſenſe would be plain by removing the *comma*. But the conſtruction will not do here, where ſurvivorſhip is a quality of jointenancy; and it is too refined, and not agreeable to the teſtator's intent in the former part of the will, where he uſes theſe words to give, and not to take away an effect; and it is unnatural to ſuppoſe that he meant them in an uncommon and different ſenſe from what he did before. The ſecond conſtruction attempted is, that theſe words mean a ſurviving the teſtator: to prevent a lapſe, if any of the children died in the life of teſtator, according to the caſe of *Bindon* v. Lord *Suffolk*, 1 *Will.* 96. This certainly is not a natural way of explaining the teſtator's intent; as one ſeldom provides by will for contingencies that are to happen in his life: but if no other reaſonable conſtruction can be found, the court might reſort to this. I think, Lord *Cowper*'s reaſoning in *Bindon* v. Lord *Suffolk* very right; that the ſurviving muſt be applied to ſome particular time, and not to a dying indefinitely. He thought, dying in the teſtator's life was the time intended; but the Houſe of Lords thought it was the time of payment, from the nature of the debt; but both concurred that there ſhould be ſome particular time. The queſtion then is, if there can be any other conſtruction upon this will than Lord *Cowper*'s? for if not, his ſhall prevail, tho' not a natural one: the diſpoſition of the cuſtomary part ſeems to be a key to the will, where he could not mean a ſurvivorſhip of himſelf; the words in the beginning ſhewing that it muſt be after his death, and at ſuch a time as it ſhould attach, *viz.* at the age of twenty-one when the child might call for his ſhare; and if afterward any of the others died before the age of twenty-one or marriage, might be entitled to part of his ſhare. The uſe of theſe words therefore exclude any other conſtruction. Then the word *like* in the bequeſt
(15) of his perſonal eſtate, refers it to the cuſtomary ſurvivorſhip, and amounts to expreſsly ſaying, if any die before twenty-one or marriage, to go to the ſurvivors: which affords a great light in the conſtruction of the deviſe of the real eſtate, which follows the teſtamentary clauſe, and

muſt

must mean the ſame ſurvivorſhip intended there, though the word *like* is not inſerted; for he can mean no other, as he is making a proviſion for the ſame children, than that if one died before he could uſe it, it ſhould not be miſapplied, but go to the reſt, which is a very natural and reaſonable conſtruction, ſuch as even courts of law would make to conſtrue the ſame words in the ſame ſenſe. Nor is this contrary to the expreſs affirmative and negative words before; for they ſhall ſtill have their effect on this contingency. It is ſaid, this is proceeding arbitrarily and by conjecture; but the conſtruction inſiſted on for the plaintiff is conjecture too; and I ſhould comply therewith, if there was not another more reaſonable and natural conſtruction. This caſe therefore ſtands on its own circumſtances diveſted of all authorities, yet conſiſtent with all; particularly *Bindon* v. Lord *Suffolk*.

The ſecond queſtion ariſes on the will of *H. Haws*. The heir at law it hereby diſinherited as to the legal eſtate, and the queſtion is, at what time time this is veſted in the children? they muſt take as tenants in common; for a joirtenancy is excluded; it not being the intent to ſuſpend the conveyance till all attained twenty-one; ſince that would introduce the inconveniencies mentioned on the part of the part of the plaintiff as the profits were only payable during minority. For if it did not veſt till all attained twenty-one, when the eldeſt comes of age, what is to become of the profits, for he is only to have them till capable of taking? The word *and* muſt therefore be taken diſtinctively *or*: viz. when he, ſhe, or they: to whom then ſhall the ſhare of the deceaſed child go? I am of an opinion, that it ſhould ſurvive to the reſt, and not deſcend to his heir: nor is the contrary to a tenancy in common; for at the time limited, *viz.* their reſpective ages of twenty-one, they ſhall be ſo, but not intitled to a conveyance before. The words muſt be tranſpoſed, as the direction of the profits came firſt: and then there would clearly have been a jointenancy of the profits during minority; for they were conſtituting a fund for younger children, which ſhall not be leſſened by giving the profits of the deceaſed child to the heir, but go to the reſt.

Where, on death of one tenant in common before 21 it ſurvived.

and conſtrued *or*,

2 Vol. 258.

Tranſpoſition of words in a will.

1 Brown, 118; 2 Brown, 18. Poſt 206.

Elliot *verſus* Collier, *July* 1, 1747. Caſe 11.

A Freeman of *London* dies, leaving no wife, but two daughters; declaring by his will that they were ſufficiently advanced in his life by marriage or otherwiſe, and therefore his eſtate, notwithſtanding the

1 Wm. 581,

(16) cuſtom, was ſubject to his will; appointing the defendant *Collier*, who had married one daughter, executor and reſiduary legatee; directing the other daughter to execute a releaſe to *Collier* of her right to a cuſtomary ſhare; and that for want of acquieſcing therein ſhe ſhould allow 25*l.* *per annum* for the teſtator's maintaining her from her firſt huſband's death. The repreſentative of her ſecond huſband, who ſurvived her, but took out no adminiſtration, brings a bill for an account and ſatisfaction for her orphanage ſhare.

The firſt objection was, that it never having veſted in the huſband it was not tranſmiſſible to his repreſentative; for which was cited *Graiſbrook* v. *Fox*, *Plowden*, and *Hole* v. *Dolman*, *Mich.* term 1736, where it was ſo adjudged at the *Commons*, and that the next of kin was intitled under the ſtatutes of *E.* 3. and *H.* 8. The ſecond objection was upon the cuſtom, that ſhe had been already fully advanced.

LORD CHANCELLOR.

The right to the wife's *orphanage* ſhare veſts in the huſband ſurviving, though he takes not out adminiſtration, and whoever takes adminiſtration is truſtee for huſband, the right not following the adminiſtration.

Whoever takes out adminiſtration, can be but truſtee for the huſband, for here the right does not follow the adminiſtration; which though the ſpiritual court may think themſelves obligated to grant to the next of kin; that does not bind the right, which was veſted in the huſband here, though he took not out adminiſtration, and is tranſmiſſible to his repreſentative; the ground of which is, that the huſband has been determined not to be within the proviſion of the ſtatute of diſtribution; for he himſelf is intitled to all the perſonal eſtate of his wife, and ſhall not be obliged to diſtribute; therefore tho' he took not out adminiſtration, ſtill he has the right. There are ſeveral caſes, where the ſpiritual court grant adminiſtration, which here is only conſidered as a truſt for thoſe who are intitled. For ſuppoſe the wife ſurvived the huſband; the father's perſonal eſtate would have ſurvived to her, exeept ſuch part as the huſband had reduced into poſſeſſion, for which ſhe would be only truſtee to him, though intitled to take out adminiſtration to the father. This court conſiders an adminiſtration *de bonis non* as a truſtee: and there are ſeveral caſes, where the right has not followed the adminiſtration.

What is an advancement, on the *cuſtom of London*. 2 Vol. 592.

As to the other objection; where a freeman leaves no wife, one moiety of his perſonal eſtate is to be divided among the children; the other ſubject to his will. But ſince the caſe of *Box* v. *Chaſe*, *Eq. Ab.* 155. if any child has been advanced in the teſtator's life, though not with a full ſhare; yet if the certainty of the advancement does not

not appear under the father's hand, ſuch child is barred; the ground of which is partly on the difficulty of taking an account after ſuch a length of time; but principally becauſe you do not know what to bring into *Hotchpot*; and if it does not appear what the ſum was, the other children might be wronged. But here the evidence does not come up to ſuch advancement; the gold watch and other furniture he gave her, are but perſonal preſents, and cannot be taken as an advancement; 3 *Will.* 317. which muſt be ſomething by way of portion or preferment to ſet the child up with: So that a ſmall ſum, as 40*l.* or 50*l.* (he being a man of ſubſtance) would not be deemed an advancement, and here he diſapproved of the match, and cannot be intended to prefer her; and as to the objection that this cuſtom being contrary to the common law, ſhould be conſtrued ſtrictly, it is not unreaſonable in its origin; and I will never ſtrain to exclude a child, unleſs he received ſuch an advancement as would make it unreaſonable for him to come here. Indeed in the caſe of a wife, depending on the marriage agreement, ſuch a ſtrain might be made. It is objected, that the maintaining her ſhould be ſuch an advancement as will bar; but it was determined in *Edwards* v *Freeman*, 2, *Wm.* 436. *Eq. Ab.* 249. That aliment by a parent to a child is no advancement: and though the queſtion there was on the ſtatute of diſtribution, there is no difference; advancement, whether on the ſtatute or cuſtom, being juſt the ſame. Indeed the aliment there was before marriage; and therefore ſtrictly conſidered ſhould be taken as an advancement: but I am afraid of breaking in upon that rule; therefore think it better to charge her with it as a debt on the father's will, which is a good evidence on what terms he maintained her, and is an anſwer to the caſe *Stanhope* v. *Stanhope* cited, where a mother was inſiſting on every little gratuity given to her ſon (who had deviſed his eſtate, in a manner ſhe did not like) as a loan: and the court would not allow her any thing, that was not intended originally as a loan. So it is an anſwer to another caſe, *Hern* v. *Barber*, where there was a covenant entered into on marriage, to pay ſo much to the huſband and wife for maintenance; which was decreed an advancement: but it was there ſaid, that a common maintenance ſhould not be conſidered in that light. But here the father ſhews in what light he would have it conſidered; and might have given it to her on what terms he pleaſed; and it would be unreaſonable and unequal, if ſhe did not make ſome allowance. But I ſhall not determine it on the ſum (25*l.*) in the father's will; but direct the maſter to ſee what is reaſonable.

Not perſonal preſents.

(17)

Aliment by a parent to a child no advancement, but where after marriage the child was charged with it as debt on the father's will.

Advancement on the ſtatute of diſtribution or cuſtom is juſt the ſame.

Caſe 12. Lady Head *verſus* Sir Francis Head, *July* 3, 1747.

The court never decrees an eſtabliſhment of a ſeparation between huſband and wife without ſome agreement, and the agreement here being only for an occaſional abſence, and the huſband offering by his anſwer to receive and maintain her, the arrears of the maintenance were decreed to her if ſhe returned in a month.

SOME difference having ariſen between the plaintiff and her huſband the defendant, occaſioned by a diſorder of mind under which ſhe laboured, ſhe left him: upon which he wrote her a letter, agreeing to pay her 400*l. per ann.* quarterly, while they ſhould live ſeparate. But afterward, upon his writing to her to return home and live with him, and her refuſal; he diſcontinued the payment, and endeavoured to ſeiſe and confine her in a madhouſe; which ſhe avoiding, on a *ſupplicavit* out of this court, a recogniſance was given by him for the ſafety of her perſon. And ſhe now by her *prochein amy* brings a bill againſt the huſband for the eſtabliſhment of this agreement for a ſeparation, and for a continuance of the payment. The cauſe ſtood over ſeveral days in hopes of an accommodation: but without effect.

LORD CHANCELLOR.

There are two queſtions; the firſt, Whether it appears there ever was any agreement to live ſeparate, and that abſolutely during the ſeparation he ſhould pay her 400*l. per ann.*? The ſecond, Whether any thing has ſince happened to put an end to the payment? As to the firſt, I think clearly, there has been no ſuch agreement proved here: the only foundation for it is the huſband's letter; which is only, that he will continue the payment while they live ſeparate; but no certain time how long the ſeparation ſhould laſt. But if there were any doubt on this letter, it is clear from the evidence, that it was looked upon only as an occaſional abſence, not an abſolute ſeparation.

As to the ſecond queſtion, of the conſequence, I will conſider it under two parts. Firſt, What effect the huſband's acts will have on that general decree prayed for by the plaintiff? Next, What effect on the arrears of the maintenance for the time paſt? As to the firſt, it is a final anſwer on the circumſtances of this caſe, to the prayer of her bill; for this court never decreed an eſtabliſhment of a ſeparation between huſband and wife, without ſome agreement for that purpoſe: and in the light it appears here, it is only an agreement for a maintenance during an occaſional abſence: then by the acts ſince done, he has

has not departed from the right of cohabitation, but ſent to her to come home. And ſuppoſing there were ſome circumſtances inducing her not to come home; yet here is by his anſwer a judicial offer to receive and mantain her. The court therefore cannot decree a ſeparation, ſince he has not behaved ſo as to forfeit his right, or cauſe the ſpiritual court to decree alimony. But ſuppoſing he had; ſhe ought to ſue in the ſpirttual court, not here, for divorce and alimony. Then to conſider it on the merits. Here are acts of cruelty alledged in endeavouring to confine her, and alſo the *ſupplicavit* and recogniſance, (which the court on application refuſed to diſcharge) as ſufficient reaſons to induce her not to go home: but I think not, ſo far as to decree a ſeparate maintenance: I am unwilling to ſpeak poſitively relating to her diſorder, which may deſerve another name; but the proofs on the huſband's part are very ſtrong, that it was a very unfortunate infirmity: ſo that it is indifferent from what cauſe it aroſe. Whether he acted prudently or no is another queſtion. Although he might have uſed a more proper method at firſt; yet his endeavouring to confine her is not ſuch an act of cruelty, as will be a ground for an abſolute and perpetual ſeparation; though ſhe ſwears the peace againſt him, even ſuppoſing he had beat her; for he may repent. Agreeable to which are the (19) rules in the eccleſiaſtical court, and the caſe of *Whorewood* v. *Whorewood*, 1 *Chan. Ca.* 250. where there was a ſeparation in fact, and maintenance agreed on: yet Lord *Bridgman* ſuſpended the payment, on her refuſing to be reconciled. But Lord *Shaftſbury* choſe rather to leave it to the eccleſiaſtical court. Sir *Leoline Jenkins*'s life 723. But as to the arrears, they muſt be decreed to her: and this is conſiſtent with my opinion on the former part; for though the *ſupplicavit* is not a reaſon for continuing the ſeparation: yet it is an excuſe for her not coming home immediately, till this judicial offer: nor did he make uſe of the moſt prudent method; and the letters which appear to have been written by him to her, might have increaſed her diſorder. But if within a month ſhe does not come home; which I cannot decree, let the payment of the arrears be ſtopped.

Cory

Caſe 13.

Cory *verſus* Cory, *July* 3, 1747.

Agreement, if reaſonable and to ſettle family diſputes, and no unfair advantage, not to be ſet aſide becauſe the party was drunk, or paternal authority exerciſed.

ON a queſtion whether it was ſufficient to ſet aſide an agreement, that one of the parties was drunk at the time. (b)

Lord Chancellor thought it was not; unleſs ſome unfair advantage was taken, which did not appear in this caſe: and what he principally laid weight on was, that this was an agreement to ſettle diſputes in a family, and a reaſonable agreement. So if a ſon tenant in tail, and a father tenant for life, agree on ſomething for the benefit of the younger children; and afterward the ſon complains of paternal authority being exerted: though there might be ſomething of that ſort, yet if the agreement be reaſonable, the court will not ſet it aſide.

Caſe 14.

Buſh *verſus* Dalway, *July* 7, 1747.

Covenant by huſband to aſſign a contingent portion of the wife to uſes of the marriage. The right of calling for it veſts in huſband, who dies without doing ſo: the wife bound by this covenant.

A Man upon his marriage ſettles a term of 500 years to raiſe 6000*l.* if no iſſue-male, for one daughter; if more, to be equally divided between them payable at twenty-one or marriage, to ſuch as ſhould be living at the death of the father and mother. There was no iſſue-male, and but three daughters; one of whom (the preſent defendant) marries, her father then living. But previous thereto, the intended huſband by a deed, to which ſhe was party, covenants, that he, his heirs, *&c.* after the marriage, will grant, aſſign and ſet over to truſtees named, at their requeſt, all ſuch ſums and ſecurities for ſuch, as are now due, owing and belonging to her, and which ſhe ſhall be intitled to in any reſpect whatſoever, over and above the ſum of 500*l.* due to her by bonds, to the huſband for life, then to her for life, then to the children. The father died, then the huſband died, without any aſſignment by him, and without any requeſt by the truſtees. She took out adminiſtration to him, and claimed this 2000*l.* her ſhare and portion abſolutely as a choſe in action not called in by the huſband, and ſo ſurviving to her. The bill was brought by her children, who were infants, to have this 2000*l.* placed out for their benefit, ſubject to her eſtate for life therein.

(b) 1 Wms. 727, 639. 1 Atk. 10. 2 Atk. 592. 1 Brown, 369. 3 Wms. 290. 2 Vol. 146. 284.

LORD

LORD CHANCELLOR.

It is impoſſible to ſay this caſe is free from doubt; but I think that on the event that has happened, the children have a right. The firſt queſtion, whether this portion which at the marriage was contingent, is within the deſcription of this covenant, depends on the words; which are ſufficient to include it. The whole muſt be taken together; and though in the ſtrictneſs of law it was not within the words *now due*; yet it was belonging to her as a portion on the contingency of her ſurviving her father: but the following words are very large, and muſt take it in; which is a ſufficient anſwer to the argument uſed, that the word *and* coupled the latter words to the former, and hindered their going farther, as it meant to carry the reſt farther: but it may be taken disjunctively *or*. Here was a term abſolutely veſted in truſtees (though the truſt was contingent) who would have been guilty of a breach with regard to her, if they had acted againſt it; nothing was to move from him: and it is very extraordinary; that ſhe ſhould take care of 500*l*. and not of this portion, which might have been 6000*l*.

Then ſuppoſing it included; the ſecond queſtion is, whether ſhe is bound? and perhaps the event might have happened, in which ſhe would not be bound; as if the right of action never had veſted in the huſband: but here it did, by his ſurviving the father. A queſtion was made, whether the huſband had a right to aſſign it in the father's life; which is not neceſſary here; although I think he might not. In *Theebald* v. *D'ſay* before Lord *Macclesfield*, an aſſignment by huſband and wife, of the wife's executory intereſt was held good. There the wife had ſomething more than in this caſe; but that turned on her joining, on which foundation the court determined it for the purchaſer, which was affirmed by the lords. Here, before the father's death he had no right of action at all; but afterward he might have called for it immediately, which the wife could have no otherwiſe prevented, than by a bill for performance of the covenant; according to which it would be ſettled firſt for his benefit, then for hers, and then for the children; for the court could not have decreed a partial performance. So likewiſe the children, or even the huſband himſelf, might have brought a bill to have compelled ſuch a ſettlement for its ſecurity; being to be taken in the light it ſtood at the father's death; and then the death

2 *Wm.* 60. and inhouſe of lords, 1729.

(21)

death of the huſband will make no alteration: ſo that the plaintiffs are entitled after her death. The queſtion here depends on that general rule, that what ought to be done, is here conſidered as done; and this ought to have been done in the life of the huſband.

Godolphin *verſus* Godolphin, *July* 20, 1747.

Deviſe to *A.* in fee, with directions to ſettle on deſcendants of his mother for their ſeveral lives, &c. *A.* may limit an inheritance.

DIXY deviſed, "To my ſiſter *Mary Dixy* and her "heirs for ever: and my will is, that the ſaid *Ma-* "*ry Dixy*, whom I make ſole executrix, ſhall in ſix months "time after my deceaſe, by ſome writing or good aſſur- "ance in the law, ſettle ſo much of my eſtate as ſhall re- "main after debts and legacies paid, on my brother *R.* "for life, and on my ſiſter *E.* for ſuch time of her life, as "ſhe ſhall be a widow, if ſhe ſurvives her huſband; and "from and after their deceaſe on any other perſon or per- "ſons for their ſeveral lives, who are or ſhall be hereafter "at any time deſcended from my mother, as my ſaid "ſiſter ſhall think fit; in ſuch manner and proportion, "and ſubject to ſuch rules and directions, as ſhe ſhall in "her diſcretion order and appoint: and ſhe may at any "time during her life, make void or change any appoint- "ment, and appoint or nominate any other new perſon, "to have and receive ſuch profit and advantage out of my "eſtate, as ſhe ſhall think fit; provided it be to the de- "ſcendants of my mother; becauſe it is my deſire, that "my eſtate ſhould continue to perſons always deſcended "from my mother; and for this purpoſe, I adviſe, that a "writing may be made to truſtees for 99 years, to the "uſes aforeſaid: if ſhe dies without executing the power, "then my brother *R.* within ſix months after her deceaſe "may do it; and on his dying without executing, any "other relation ſhould appoint, with the conſent of the "Lord *Chancellor* for the time being."

She within ſix months after his death appoints, with power of revocation: afterward marries and revokes, and limits new uſes to truſtees to permit *W. Godolphin*, one of the plaintiffs, and a deſcendant of the mother, to receive the profits for his life, remainder to his firſt, &c. ſon, and the heirs-male of ſuch ſons, and in the ſame manner to ſome other deſcendants of the mother, with a remainder to the right heirs of the mother.

The bill was to have the benefit and eſtabliſhment of this ſettlement; and the general queſtion, whether ſhe had power by the will, to limit an inheritance.

For

For plaintiff. The general view was, that this eſtate ſhould go among the deſcendants of the mother: the manner he leaves to his ſiſter, in whom he had great confidence. Had there not been the words *for their ſeveral lives*, the general words following would certainly carry an eſtate-tail; which ſhall not be hindered from having their effects by the former words: but tho' the expreſs words did not, the nature of the caſe would ſhew, he intended a power of limiting more than an eſtate for life. This is executory, under a will, and to be executed according to the intention of the teſtator, for which limitations for life would not be ſufficient, as they could not carry it to deſcendants of the mother not then living. The ſaying, it ſhall go to the deſcendants of the mother, is ſaying, that it ſhall go to the heirs of the body; which is as ſtrong as the words in any of the caſes cited in *King* v. *Melling*; and the words *are or ſhall be*, neceſſarily imply as much as any words in *Humberſton* v. *Humberſton*, 1 *Wm.* 332. The intention was not to go to the heir at law as ſuch; but according to the ſettlement which was intended to be made, ſo as to take in all: and by the other conſtruction, there might be a deſcendant from the mother, who could not take: as where two ſons by different venters, and one enters, and dies ſeiſed. (22)

For defendant, Sir *Woolſton Dixy*, heir at law. The former expreſs words exclude an eſtate-tail: but here are no words giving an inheritance. The view of the teſtator ſeems principally, that it ſhould remain as long unalienable as poſſible; he being indifferent which of the deſcendants take, or who appointed; and with that intent it is with power of revocation, that ſhe might limit eſtates for life to the new deſcendants of the mother, as they came *in eſſe*; by which means it would continue unaliened for another generation: But her diſcretionary power is confined to eſtates for life; her execution therefore is contrary to the direction and intent of the teſtator, for by her limitation, the iſſue might alien at twenty-one, during the lives of ſeveral deſcendants of the mother, *in eſſe*, and in the view of the teſtator, ſhe could not exclude when *covert*; nor was ſhe impowered to limit to the right heir of the mother; and altho' the right heir happens to be a deſcendant of the mother, and in this caſe muſt be ſo; that will not make it good. But if there is any doubt on the intent, as ſhe has not appointed properly, the heir at law, who is alſo equally within the intention of the teſtator, ſhould be preferred.

LORD

LORD CHANCELLOR.

This is a very dark and intricate will; there are three queſtions ariſe on it. The firſt and principal is, what is the true conſtruction of the will? the ſecond, whether the appointment was made purſuant thereto? and if not, the third is, in what manner the court, which certainly has power to correct it, ſhall direct as ſettlement?

As to the firſt: From the tenor of the will, though not from the words, his intention appears to have been to provide for the younger branches of his mother's family: and therefore he gives nothing to the elder brother. He had great confidence in, and regard for his ſiſter, and ſeems to have given her this power of revocation, to keep the reſt of the family depending on her; I do not doubt but he might have intended a ſucceſſion of freeholds, and the words *who are or ſhall be, &c.* look that way. The words *manner and proportion* carry it no farther than for life; nor *ſuch profit as ſhe ſhall think fit*; otherwiſe ſhe would have a greater power under the revocation than under the power itſelf. But the words on which I lay greater weight, and which I think enlarge the power to give a greater eſtate than for life, are *I adviſe that a writing, &c.* His principal intent is, that his eſtate ſhall continue to perſons deſcended from his mother. This clue directs us through the will; and whatever is the beſt method for executing this intention muſt be taken, as far as the rules of law will allow.

(23)

Execution of a power by a *feme covert.*

As to the ſecond queſtion. Two objections are made againſt the execution of this power, to manner and the ſubſtance. As to the firſt, it is ſaid, that a *feme covert* cannot execute a power; and that there are no words in the will authoriſing her ſo to do. But the words *at any time or times during her life* imply this: and although there were not thoſe words, ſhe might have done it; for it is a power without an intereſt. Nay, there are caſes which go farther; yet although there was an intereſt, ſuch an execution ſhould be good; but this is improperly called a power; for being a direction to a perſon who has the fee, it is rather a truſt.

As to the ſubſtance, the objections are, that ſhe has not confined herſelf to eſtates for life; and has limited to the right heirs of the mother.

I am of opinion, that ſhe had a right to go beyond eſtates for life; but whether ſhe has done it in right order, I doubt.

doubt. In *Humberſton* v. *Humberſton*, the words *for life* are annexed to every perſon that is to take; and the negative excluſive word *only*, in every clauſe: yet in that caſe, an inheritance was decreed. So here the intent, that it ſhould always continue in deſcendants of the mother, cannot take place without limiting an inheritance. The queſtion therefore is, whether the words *for their ſeveral lives*, ſhall controul the general intent. I think it not: it is true, this will put it in the power of a common recovery; but then unleſs an inheritance be ſome time or other created, it will be impoſſible it ſhould go in the line the teſtator intended. As in *Shaw* v. *Weight*, *Eq. Ab.* 185, where it was reſolved in *B. R.* to be an eſtate for life: but by the *Lords*, that it was an eſtate-tail; becauſe, though the other conſtruction would preſerve it longer, yet it would turn it out of the line. It is ſaid, that here it will not keep it longer in the line, becauſe the heir at law is a deſcendant of the mother, and muſt be ſo here; but the teſtator intended they ſhould all take by the ſettlement, and although the heir happens to be a deſcendant, yet he ſhould take *per formam doni*. Beſide, this court conſiders an eſtate, over which one has an abſolute power, different from that of which a recovery muſt firſt be ſuffered: but according to the conſtruction contended for, the heir would be abſolute owner. But the limitation to the right heirs of the mother was wrong, for he gave no power to diſpoſe of the reverſion in fee; ſo that it devolved on the court. (24)

This brings it to the third queſtion; and I am of opinion, that the teſtator intended eſtates for life to all the deſcendants *in eſſe* at his death; but to thoſe I ſhall not add what are come *in eſſe* ſince: then the remainder to the heirs of the body of the teſtator's mother; remainder or reverſion in fee to the right heirs of the teſtator.

Allanſon *verſus* Clitherow, *July* 23, 1747. Caſe 16.

W. Allanſon deviſes his real and perſonal eſtate, ſubject to the payment of annuities and legacies to truſtees, their heirs, executors, *&c.* to raiſe ſuch annual ſum for the maintenance of his ſon, as they, *&c.* ſo as to afford him a liberal education till he attained twenty-three, and then on this further truſt, that when he attained twenty-three they ſhould grant, convey and aſſign all his real eſtate to him, his heirs, executors and aſſigns, ſubject nevertheleſs to ſuch ſettlement as aftermentioned: and if he marries a gentlewoman

woman with a good fortune, the truſtees to ſettle a rent-charge on her, not exceeding 400*l. per ann.* for her life, as a jointure, and in bar of dower and ſubject thereto, on the iſſue of that marriage in ſtrict ſettlement, as counſel ſhall adviſe. But if he dies without iſſue of his body lawfully begotten, he gives additional annuities to the ſame perſons as before, which in ſome events were to be diminiſhed; and the ſaid real eſtate to his nephew *C. Cowper* for life, then to the truſtees to ſupport contingent remainders; then to the firſt and every other ſon in tail, they changing their names to *Allanſon*; and in default of ſuch iſſue, to the teſtator's right heirs for ever. His perſonal eſtate to be aſſigned to his ſon at twenty-five; but if he died before without iſſue, then over in a particular manner.

The teſtator afterward added a codicil; reciting, that having given his lands to his ſon for life; remainder over, he gives him power to diſpoſe of any part thereof; but the money thereby raiſed, to be paid to the truſtees to lay it out in a purchaſe, and ſettle it in the ſame manner.

(25) This bill was brought by the ſon to have an execution of the truſt according to the will and codicil; he having attained the age of twenty-five unmarried; and inſiſted, that he thereby was become intitled to the poſſeſſion of both the real and perſonal eſtate.

LORD CHANCELLOR.

This cauſe ariſes upon a will, of which it is difficult to make a conſiſtent conſtruction. The eſtate was oddly ſituated in reſpect of its increaſing or diminiſhing in point of value. Two points were inſiſted on for the plaintiff: but having gone upon the firſt, they have not fully conſidered the latter, where lies the greateſt doubt. The firſt is, that the ſtrict ſettlement directed to be made upon the ſon's marriage, with the remainder over to *Cowper*, &c. are all only contingent limitations, *viz.* If the ſon married before twenty-three, then to take effect; but if he attained that age unmarried, the fee to be conveyed to him. The ſecond is, that ſuppoſing this againſt him; yet he is intitled by the ſubſequent words, introductory of the deviſe to *Cowper*, to have an intermediate remainder in tail general, after the particular limitations precedent to *Cowper*'s eſtate. The defendant inſiſts that the eſtate in all events is ſubject

to

to the ſtrict ſettlement; and that the plaintiff is only to be tenant for life, with remainder to his ſons, remainder over.

The firſt point is clearly againſt the plaintiff: that notwithſtanding his attaining twenty-three unmarried, all the ſubſequent limitations are to take place within the intention of the teſtator; whoſe meaning could not be to make them depend on that contingency, with which they have no connection, and which muſt be confined to the increaſe of the annuities only, *viz.* that his ſon ſhould not be ſo charged; but that a more remote relation ſhould, if it came to his hands. The diſpoſition of the perſonal eſtate cannot affect the conſtruction of the real eſtate: if it had ſtopped at the firſt clauſe, it would certainly have given a fee; but the ſubſequent words, *ſubject to ſuch ſettlement*, &c. reſtrain it. The word *heirs* in a will is always underſtood, ſuch heirs as the teſtator meant, and he has ſhewn here afterward that he meant heirs of his ſon's body, under ſome deſcription or other, and not heirs general, ſo as to give him a fee: and this conſtruction is frequent even in legal limitations: but the codicil puts it out of doubt; where he ſays expreſsly, he had given to his ſon for life, and then in ſtrict ſettlement; and it plainly ſhews, that he did not intend it ſhould depend on this contingency; for the codicil was made but a few months before his attaining twenty-three, and if the teſtator had intended him a fee, what occaſion was there for the great care and proviſion for the money ariſing from the ſale, when probably the ſettlement would never take place? it being ſo ſhort a time between that and the ſon's attaining twenty-three, at which time he would have the abſolute diſpoſal. (26)

As to the ſecond point; I am of opinion, upon great conſideration, that there muſt be ſuch an intermediate remainder in tail, after the ſtrict ſettlement; for it would not otherwiſe be preſerved in the channel intended by the teſtator: and to this it ſhall be taken for granted, that by the former point, he is tenant for life expreſsly: and then the queſtion is, whether the ſubſequent words, *if he dye without iſſue*, are ſufficient to enlarge or give an eſtate-tail by implication. There are two caſes to be conſidered: (c) the general rule is, that an expreſs eſtate for life is not to be enlarged by implication; for which *Bamfield* v. *Popham*, 1 *Wm.* 54. is a great authority. But what was there relied on

Deviſe to *A.* for life: with power to the truſtees to ſettle a jointure if he married a gentlewoman, and in ſtrict ſettlement on the iſſue of that marriage; but if *A.* died without iſſue of his body, then over; the latter words give *A.* an eſtate tail by implication.

(c) 1 Wms. 54. 2 Vern. 427, 449. unleſs the manifeſt intention of the teſtator appears. 1 Burr. 74. 3 Burr, 1570, 3 Salk. 734.

on was the teſtator's proviſion for all the iſſue-male of *Popham*, (for it is wrong ſtated in *Sal.* where it is only to the tenth ſon) ſo that it could be of no uſe there, to conſtrue it an eſtate-tail, ſince it would be preſerved in the intended channel, without that conſtruction; which I mention to introduce the caſe of *Langley* v. *Baldwin*: which was a diviſe for life; remainder to the firſt, and ſo to the ſixth ſon only; and if he died without iſſue-male, then over. Lord *Cowper* ſent it to the court of *Common Pleas*, and the opinion of the judges was, that the ſubſequent words, *if he dye without iſſue*, ſhould carry an eſtate-tail, in order to let in any ſubſequent ſons, who otherwiſe could not take; but it would go over to a remote relation. So that the ground of the difference between this and the other caſe is plain; and in the preſent caſe, the iſſue on the marriage only is provided for: ſo that if the firſt wife dies, any iſſue by an after-taken wife would be excluded, contrary to the intent of the teſtator; unleſs ſome benefit ariſes to them under the laſt clauſe: and there is the ſame inconvenience as in *Langley* v *Baldwin*; which is wrong reported in *Equity Ab.* 185, in the very point. It was objected for the defendant, that this inconvenience will not happen here; for that the truſtees might execute this power *toties quoties*, and that *gentlewoman* is *nomen collectivum*. But that cannot be according to the conſtruction of powers, which can be executed but once, unleſs the words import otherwiſe, as it evidently is not here; although it might be executed on a ſecond wife, if not done before; and this decree anſwers all the words in the will. It is objected, that this will give the ſon a power to ſuffer a recovery, and bar the limitation to *Cowper*. But there is no help for that; for if the will is ſo framed, as that the court cannot reſtrain ſuch common recovery, (which is a conſequence of law) without contradicting the teſtator's intention in the channel of deſcent; the law muſt take its courſe. Let the ſettlement therefore be made accordingly.

N. B. Lord *Chancellor* obſerved, that Lord *Trevor*, 1 *Wm.* 56, began his argument in *Bamfield* v. *Popham* with ſaying, that it was reſolved, that *ceſtuy que truſt*, with remainder to the firſt and every other ſon, *&c.* could not (27) deſtroy the contingent remainder, in *Penhay* v. *Hurrel*, 2 *Ver.* 370. although that point is not there taken notice of, becauſe it is only a report of the argument: and that this ſhewed it was not entirely a new point, or firſt determined by Lord *Talbot* in *Chapman* v. *Bliſſet*, and afterward by him in the caſe on Mr. *Hopkins*'s will, as was apprehended at the bar.

Beaumont

Beaumont *verſus* Thorp, *July* 25, 1747.

Caſe 17.

2 Vol. 11, 16

Settlement after marriage voluntary and void againſt creditors.

UPON the marriage of the defendant with her late huſband, he and his father promiſed to ſettle an eſtate on her in conſideration of the marriage and 1000*l.* portion; but ſhe refuſing to let the father have the portion, he ſaid ſhe ſhould have none of his lands, and would not ſettle them upon her, but conveyed them to his ſon in fee. The ſon, ſeven years afterwards being indebted, ſettled the eſtate upon her for a jointure, and then in ſtrict ſettlement, and died. His creditor brought this bill againſt his widow, and infant ſon, for ſatisfaction of the plaintiff's debt.

It was argued, that this was not a voluntary ſettlement by the huſband, but for valuable conſideration, being an execution of the father's promiſe before and to be preſumed; therefore that it was done in conſideration of marriage. His promiſe was to ſettle a jointure on her marriage, which muſt mean in ſtrict ſettlement; it was a reaſonable ſettlement; and the children are purchaſers under it; nor is it fraudulent within the ſtatutes of *Elizabeth*, and the plaintiff who is only a ſpecialty creditor at large, not proceeding on this particular eſtate, is not to be favoured, as a purchaſer is, but ſuppoſing it both voluntary and fraudulent; this being the caſe of an infant, the *parol* ſhould demur.

LORD CHANCELLOR.

There is no colour to ſay, this is a ſettlement for valuable conſideration; for it is in conſideration of a marriage already had without recital of any articles before the marriage: ſo that on the face of it it is voluntary: but then it is ſaid, I am to preſume it was done in performance of the father's conveyance to the ſon ſeven years before, which imported a conſideration. This I could not do, if it ſtood by itſelf; but it is contradicted by the evidence, and the father put it in the ſon's power to do what he pleaſed with it; and it were an odd preſumption, that the father performed his promiſe by his ſettlement, and that the ſon performed it again. If then I do not ſay, it is void and fraudulent in reſpect of bond creditors, it will be contrary to the ſtatutes of *Elizabeth*: but there is a diſtinction taken between purchaſers on the credit of the eſtate, and creditors who had not the eſtate particularly in view, and there are

are caſes of that kind: but latter caſes do not go on that diſtinction, ſo that though it be hard, it is void againſt the plaintiff.

Parol demurs only where a deſcent is not created by the ſtatute of *Elizabeth*, or of fraudulent deviſes.

Then the *Parol* never demurs but where the eſtate comes to the heir by deſcent: ſo on the ſtatute of fraudulent deviſes; which does not create a deſcent by the operation of it, but only ſays, it ſhall be void againſt creditors.

Caſe 18. **Baker *verſus* Hart, *July* 31, 1747.**

ADmiral *Hoſier dying* in 1727, a marriage was alledged to have been had with him; the iſſue of which marriage was a daughter; who married *Hart*, by whom ſhe had the defendant. There were various litigations after the admiral's death about his real and perſonal eſtate: and as ſoon as poſſible an ejectment was brought on the demiſe of *Hart*, and his wife claiming as his daughter, and a verdict was found for the leſſors of ths plaintiff, which affirmed her legitimacy. Then there was a long diſpute in the eccleſiaſtical court concerning the perſonal eſtate, between the ſuppoſed widow only, and the next of kin, to whom adminiſtration ſhould be granted: which depended on the queſtion, whether ſhe was ever married to him; and it was determined there, that ſhe was not: which was finally affirmed upon appeal to the *Delagates*, and adminiſtration granted contrary to her claim. Upon application for a commiſſion of *review* it was refuſed here on great evidence, and on thoſe two concurrent ſentences: then the plaintiff brought a bill here againſt the widow and her daughter: controverting the real eſtate, and to have an injunction, and account and final determination; which was heard *May* 1746, when two iſſues were directed. Firſt, whether the mother of the defendant was daughter and heir of Admiral *Hoſier?* The ſecond, whether *William Baker*, late father of the plaintiff was his heir? It was directed to be tried at the bar of the *Common Pleas*; but at deſire of the plaintiff was tried at *Niſi Prius*. There was a verdict for the defendant; and it now came upon the equity reſerved, and an application for a new trial.

LORD CHANCELLOR.

I own, I have had ſome doubt of what was proper for the court to do; for though I apprehended the laſt verdict not to be according to the truth and juſtice of the caſe; yet there are objections againſt a new trial, which have

ſome

ſome weight. It was ſaid to be a general rule, not to grant a new trial, after a trial at bar; and that it is to be conſidered here in that light, as it was altered at plaintiff's deſire. But there is no certain rule for that; and in the firſt caſe of this kind, in *Stiles* 462, a new trial was granted, after a trial at bar: the application here is not to ſet aſide the former verdict; and in doubtful queſtions relating to inheritances, a court of equity frequently grants a new trial without ſetting aſide the former verdict, which is of great conſequence to the parties; for then it may be given in evidence, though not concluſive; either party being at liberty to ſhew on what grounds it was obtained: but courts of law in that caſe always ſet the former aſide. It was ſaid, that this was a matter of inheritance, and therefore proper to be tried again. As to that, it never has prevailed as a general rule, but according to the circumſtances of the caſe: if there is any doubt of the facts, the court has often done it, as in *Edwin* v. *Thomas*, 2 *Ver.* 75. *Leighton* v. *Leighton*, 1 *Wm.* 671. where ſeveral trials were granted, becauſe the inheritance was to be bound, as it is alledged for the plaintiff it would be here, he having no opportunity to try it again in ejectment. The contrary is urged for the defendant. I do not ſee which way this argument will conclude: if a new ejectment may be brought, where is the prejudice to the defendant to grant a new trial, for the plaintiff will only have coſts here? And according to the caſe of *Sherwin* v. Lord *Bath*, *Prec in Chan.* 261. it will be ſtill liable to an ejectment, which takes off this objection againſt a new trial; ſince it will not quiet the defendant's poſſeſſion. But it is ſaid for the plaintiff, that he would be abſolutely bound; becauſe the court muſt give ſome directions as to the application of the rents and profits come to the receiver's hands, who was appointed by the court to account with the defendant; and that therefore if a new ejectment ſhould be brought, the defendant might bring a bill for a perpetual injunction, which would be granted. But the caſes cited for this are not entirely applicable, as in the caſe of *Vernon* v. *Acherly*, where the court granted an injunction, becauſe otherwiſe the execution of the truſts decreed would be overturned, and there would be no end of things. In the caſe of *Attorney General* v. *Montgomery*, *Nov.* 25, 1742, an injunction was alſo granted on the foundation of the decree for execution of the truſt. So in another caſe of Sir *Thomas Colby's* will, where the court had decreed a partition and conveyance of an eſtate, ſo that an ejectment brought, tended equally to overturn the decree of the court, as in other caſes: to theſe the preſent caſe

(29)

3 Atk. 542.

bears ſome analogy; but does not go quite ſo far; for the appointing a receiver was only interlocutory, and not a judgment upon the merits, in which the court had proper and final juriſdiction. This conſequence indeed it would have; that if the plaintiff recovered on a new ejectment brought, he might have an action for thoſe very meſne profits, which the court had before diſtributed: but this is a middle caſe between both, and never yet determined. The objection therefore on both ſides, as to the bringing a new ejectment, is of no weight here: the objection againſt a new trial, that this is a queſtion of legitimacy, and ought to be favoured, is of ſmall weight; for that is true, where the legitimacy claimed is on a cohabitation, which was the caſe of *Stapleton* v. *Stapleton*, *Aug.* 3, 1739, where the only queſtion was on the time of marriage, whether before or after the birth of the eldeſt ſon; which (30) therefore ſtood in a favourable light; but the queſtion here is different, and not to be favoured; the legitimacy of this daughter being firſt raiſed and ſet up after the father's death, at which time ſhe muſt be ſeventeen years old, and no pretence of cohabitation in his life: but all the facts ſpeak the contrary, both to that and the marriage, which is attended with ſtrong circumſtances of ſuſpicion; ſuch as the licence being taken out by the woman, and Admiral *Hoſier*'s being deſcribed by a wrong addition of mariner: then it is inſiſted, that there have been two concurrent verdicts for the defendant: two iſſues were directed in order to try the whole right; for though the firſt would be ſufficient, if found for the defendant; yet not if found for the plaintiff, who muſt prove himſelf heir, as he muſt recover upon his own title. The verdict was for the defendant on the firſt iſſue, and to the ſatisfaction of the judge, who informed me, that the jury did not enter into the ſecond point: ſo that it cannot be taken to be a determination againſt the plaintiff, on the ſecond iſſue. It is certain that the former verdict was given in evidence on the latter trial, and had great weight with the jury. If therefore there is any thing to impeach the former verdict, it takes off the objection of two concurrent verdicts; and it does now *Moſely* 321. plainly appear before me, that there has been mal-practice, which could not appear nor be given in evidence, in the manner it was offered upon the trial. It was further objected by the defendant, that there has been great delay, and that ſeveral of his witneſſes in the firſt trial are dead; which is certainly unfortunate, and muſt have had ſome weight, and occaſioned his evidence to be looked on favourably in the ſecond trial, and will do ſo again. But witneſſes

neſſes are mortal; and from the circumſtances it does not appear to have been unnatural to wait for the determination of the court. One would, if poſſible, reduce to a conſiſtency the different determinations of the courts; which is an inconvenience ariſing from the conſtitution, and to be lamented when it happens: as it did in the caſe of *Maxwell* v. *Mountague*. So that it is proper, that the parties ſhould have an opportunity of laying the whole before the court by a new trial, and that at the bar of *B. R.* but as the defendant is an infant, and in mean circumſtances, the plaintiff muſt be content with *Niſi prius* coſts, if found for him.

Lord *Portſmouth verſus* Lady *Suffolk, and* Lord *Effingham, Aug.* 1, 1747.

Caſe 19.

THE plaintiffs claimed the eſtate in queſtion, under a reverſion in fee deſcended to them as coheireſſes to Lord *Suffolk*, by virtue of a ſettlement made by him in 1687, which limited the reverſion to his right Heirs. Lord *Effingham* claiming under another ſettlement and recoveries ſuffered; and the deed in 1687, being in the hands of Lady *Suffolk*, who refuſed to deliver it up, unleſs her rights were confirmed, the plaintiffs were obliged to bring a bill for diſcovery. Lady *Suffolk* inſiſted, that on her marriage and bringing 25 00*l.* portion it was applied to the paying off incumbrances; which when paid, were aſſigned to her; and a jointure made of 160 *l. per ann.* and that her huſband alſo covenanted by leaſe, will, or otherwiſe, if ſhe ſurvived, to leave her a houſe worth 30 0*l.* for life: if not, that his heirs, executors, *&c.* ſhould pay her the intereſt of 3000*l.* for life: and then there was a term of 100 years in truſt, that upon his not ſettling ſuch houſe according to the covenant, the truſtees ſhould, by and out of the rents and profits of the lands compriſed in that term, put her 150*l. per ann.* for life in ſatisfaction of the covenant before. The plaintiffs offered and were decreed to confirm all this: and after a trial in ejectment and verdict finding that the recoveries were bad, and had not barred the reverſion in fee, the plaintiffs now inſiſted on an aſſignment from her of all the mortgages, *&c.* paid off by her portion, as ſtanding in her place, who could have no other right to them than as ſecurities; the benefit of which the plaintiffs claimed for the loſs they ſuffered in confirming her jointure, which depending on the ſame recoveries would not have been good, if ſhe had not had

(31)

that deed in her cuſtody: and alſo that this annuity of 150*l.* was a perſonal demand, and to come out of the perſonal eſtate, for which the real was only a ſecurity, if that was deficient; the term coming in aid of the covenant, and only a collateral ſecurity for her principal demand, the houſe; and therefore if ſhe came on them, they might by circuity come on the perſonal eſtate, which ſhe poſſeſſed as executrix.

For her it was inſiſted, that Lord *Suffolk* not having left her the houſe, ſhe had her option to take that which was moſt beneficial for her, either the houſe, or the 150*l. per ann.* as an incumbrance on this eſtate. The intereſt of the 3000*l.* was an additional jointure iſſuing out of lands, and to be conſidered as real eſtate, and the perſonal eſtate was not the fund originally to make it good, but ſhould go to thoſe intitled thereto.

LORD CHANCELLOR.

It is plain, that ſhe cannot ſo make her election as to change the nature of the charge, and turn it on which fund ſhe pleaſes; whether it was a ſtranger or no, that was intitled to the perſonal eſtate. The queſtion is, what was the contract between them on their marriage? it plainly reſted upon the covenant, the term was a further ſecurity; not a new proviſion for her. If this ſettlement had been good of his own eſtate, of which he might diſpoſe, and there had been a ſon, the equity would have been this; that ſon might have ſaid, this was a covenant, (32) which being broke by his father, muſt be ſatisfied out of his perſonal eſtate; and it is ſtronger for the plaintiffs; for it is a ſettlement of an eſtate, which he had no right to ſettle; and as the plaintiffs muſt confirm all her rights, they are purchaſers of all her intereſt, and are intitled to every thing ſecuring her right. So the equity is ſtronger for them, than between a ſon or heir at law, and the repreſentative of the perſonal eſtate. The incumbrances are not paid off for thoſe who were not intitled under the ſettlement: but they are purchaſers by letting her have her jointure out of their eſtate. There is no colour therefore to ſay, the repreſentatives of the perſonal eſtate ſhould be preferred to the plaintiffs, who muſt be indemnified againſt the 150*l. per ann.* out the perſonal eſtate; and the ſecurities be aſſigned for the plaintiffs.

Attorney

Attorney General *verſus* Lloyd, *Auguſt* 1, 1747. Caſe 20.

JOHN MILLINGTON, (d) ſeiſed of a conſiderable real and perſonal eſtate, made a will in 1734, and gave all his real and perſonal eſtate to be laid out in purchaſe of real eſtate to his executors and other truſtees and their heirs, to apply the rents and profits to payment of ſome legacies; then to reimburſe themſelves, and then to a charity. He afterwards made a codicil in 1736, taking notice that he had given his real and perſonal eſtate to certain uſes; and that being doubtful, whether by the late mortmain act his deviſe of his real eſtate to the charity or part thereof would be good, and being deſirous to confirm it in that caſe, and not otherwiſe, he gives ſo much of his real and perſonal eſtate, as could not paſs by his will, to the uſe of his nephew *Millington Buckley* at his age of twenty-one, with limitations over, on his dying without iſſue, with proper maintenance till that age. He afterward makes another codicil, reciting the former and the will, and that being adviſed, that his deviſe to the charity was void as to the real eſtate, though not as to the perſonal, and being deſirous to continue it, and to make farther proviſion for better ſupport thereof, he gave his perſonal eſtate to his executors upon truſt, that if it cannot be laid out in land, it may in ſecurities for the ſame charity: and his real eſtate he gives unto and for the uſe of *Millington Buckley*, at twenty-one; and declares, that it is his opinion, that his eſtate at *L.* is ſufficient to maintain him during his minority. Upon an information to have the will and codicils ſo eſtabliſhed, as that the charity might be carried into execution; it was decreed at the *Rolls*, that the will was well proved, and that the truſts ſhould be performed, and that a ſcheme ſhould be propoſed for carrying the charity into execution: from which decree the defendant *Millington Buckley* brought the preſent appeal.

Revocation of a will merely on the words, ſent to law.

For the relators. The teſtator dying after the late *Mortmain* act made in 1736, the firſt queſtion, whether the deviſe of the real eſtate to the charity by his will made before that act is good, cannot now be diſputed; for it was determined before the twelve judges in *Aſhburnham* v. *Kirkhal*, while the preſent ſuit was depending at the *Rolls*, that the deviſe in ſuch caſe was good. The ſecond queſtion is, whether the deviſe is revoked by the codicil; which

Will before the late *mortmain* act, teſtator dying after it: good

(d) Poſt. 186. 190.

was

was the point determined at the *Rolls*, as it was decreed, that the truſt of the will ſhould be performed. The firſt codicil has expreſſed only the teſtator's doubt; and he has there given nothing, but in caſe the real eſtate was not well deviſed, and in that caſe only: and therefore, as the law will permit it, the deviſe will be good. In the ſecond codicil the teſtator does not, as in the former, give upon a contingency of the law's not ſuffering it; but on a ſuppoſition that he could not do it: and ſo on a miſtake in law; under which if he had not been, he would have given it otherwiſe. Where one proceeding on a miſtake revokes thereon, it is a contingent revocation. It is the ſame as if he had ſaid, "becauſe I am adviſed, that the deviſe is void:" and that error is the foundation of the gift to the defendant, a condition annexed thereto, and to the revocation, on which only this gift can operate; and the conſequence is, that this prevents a revocation: like the caſe of *Onions* v. *Tyrer*, 1 *Wm.* 343. 2 *Ver.* 741. *Prec. Chanc.* 459. In the caſe of *Clifton* v. Lady *Lombey*, the teſtator, in conſideration that his wife promiſed to continue his widow and to leave to the children at her death, deviſes to her: the teſtator there was under a miſtake, there being no ſuch promiſe by her; for ſhe denied it, and there was no proof of it: yet the court thought, that becauſe he had thus taken notice of ſuch promiſe by her, it ſhould be the condition of the giſt. So whatever appears to be the cauſe of the gift, if there is a miſtake in that cauſe, it is naturally annexed to it. So in 2 *Chan. Ca.* 16. *Winkfield* v. *Comb*, ſuppoſe the teſtator had deviſed to *A.* who was his wife; and it appears that ſhe had married before: it could not be good. Suppoſe a deviſe to *A.* and afterward a codicil reciting the will, and that teſtator was adviſed *A.* was dead, and gives it to *B.* If *A.* was alive, *B.* will have nothing: the conſtruction of the perſonal eſtate may ſerve for the real: and *Swinburn*, under the general head of what is revocation of a will, mentions *error*, and puts this caſe; that becauſe my ſon is dead, *B.* ſhall be executor: if that fact is falſe, *B.* ſhall not be executor. So that from the general intent and expreſſion of the teſtator, there is no revocation.

For defendant. The laſt teſtamentary act muſt operate ſtrongly. Whatever was the teſtator's motive, he meant an abſolute not a conditional act. The firſt codicil is made after the act of parliament creating his doubt; he there makes a diſpoſition with a view to his doubt; the doubt as to the real and perſonal eſtate is the ſame; it being

ing to be laid out in lands, and therefore he diſpoſed of both, if the deviſe was not good: but afterward finding he could make as great a proviſion for the charity by his perſonal eſtate, he does not leave it to the conditional diſpoſition as on the firſt codicil, but decides it himſelf, and not in the way of the firſt codicil; for then he would have uſed the ſame words. As to the perſonal, he has left it open to the queſtion: not ſo of the real eſtate, which he would not have torn from his nephew. He has left ſufficient perſonal eſtate to the charity, and cannot be ſaid to mean to leave his real eſtate to it. Then he has given directions, which by a ſide wind would increaſe the charity, by eaſing the perſonal eſtate in part, applying part of the real for maintenance till twenty-one; and if he had intended more, why did he not eaſe it entirely? It is impoſſible to ſay what he would do; but he thought there was enough for the charity by eaſing the perſonal eſtate in part: it muſt be admitted, that in expreſs words there is an abſolute deviſe; but it is ſaid his motives muſt be conſidered. There is a difference between the motives to do a thing abſolutely, and on condition; for in the laſt caſe it will depend upon the condition, but in the other cannot be inquired into. Suppoſe, on the knowledge of this doubt, they came to an agreement; the court could not ſet it aſide: his motives were reaſonable; and the court cannot ſay, your abſolute deviſe ſhall be conditional. The caſes cited are different: in all of them the teſtator was miſtaken; which it is begging the queſtion to ſay here. In Lady *Lombe*'s caſe it was an imperative bequeſt. In *Onions* v. *Tyrer*, the whole went on the evidence, of what amounted to cancelling. The court is not to ſtrain in favour of revoked wills againſt an heir at law; and if the court can go into it, on ſhewing what were the motives, there is no knowing where it will end.

LORD CHANCELLOR.

I am very doubtful about this caſe: and would put it in a proper way of being determined. This is very different from all the caſes cited: the queſtion of revocation does not turn upon collateral circumſtances, but merely on the words in the inſtruments themſelves; which make it differ from *Onions* v. *Tyrer*'s—indeed Lord *Cowper* there ſays, it might be relieved on the head of accident: but I do not know how he could come at it in a queſtion between deviſee and heir at law. It is proper therefore for a court of law; and the ſame conſtruction muſt be made as there.

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The firſt reaſon why I doubt, is, that if the teſtator had intended, as the relators contend, that this was a revocation, and a new deviſe only in caſe the will was not good, he would have left it on the firſt codicil: and no occaſion for making a new one; for it would be juſt the ſame with reſpect to the charity as on the firſt. Another reaſon, which makes me doubt, is, that it is very nice to ſay, that becauſe the reaſon a perſon gives fails, therefore his deviſe (35) ſhould fail. I do not know how far that will extend; the teſtator has put it on the advice he received, which was a fact of his own knowledge; and he has grounded it on that advice, and not on the reality of the law: he might do it in order to quiet the doubtful queſtion; but I do not ſay he did ſo. The third and principal reaſon is, I doubt, whether this diſpoſition is put ſingly on the point of law: for conſidering the material words *being adviſed*, and the ſubſequent words, who can tell what he meant there? the codicil was made two years after, and his perſonal eſtate might be ſo increaſed, as to be a ſufficient fund for the charity; for all this together might be his reaſon, and it is impoſſible to ſay he depended on one more than another. I give no opinion, for it is a mere point of law, and a new caſe; and will ſend it into *B. R.* to be there ſolemnly argued, and reſerve further conſiderations till after the judge's certificate.

Caſe 21. Townſend *verſus* Lowfield, *July* 20, 1747.

WILLIAM HALL, an extravagant young man, got *Lowfield* to raiſe him money on promiſſory notes of *Hall*, indorſed by *Lowfield*, who alſo got notes and bonds from *Hall* for a very large ſum. *Hall* was afterwards ſued by ſome creditors, and diſcharged out of priſon by the inſolvent act, and his effects aſſigned over. *Lowfield* (who had been three times bankrupt, and the laſt time without any dividend made of his effects, and not two years before his dealing with *Hall*) being a principal creditor, brings a bill againſt *Hall*, the aſſignees, and perſons in whoſe hands the eſtate was; and a general account was decreed to be taken of what was due. On going before the maſter, ſeveral objections aroſe; and the other creditors of *Hall*, having got more influence over him, procure him to make an affidavit that *Lowfield* had obtained an acknowledgment and admiſſion of his debts from him, without any conſideration; and application was made to the court, that *Lowfield* might not be allowed to produce a paper to that

that purpoſe, as being under the hand of debtor to creditor; the maſter could not ſet it aſide; but *Lowfield* conſented to lay that paper out of the caſe. The maſter being directed to take an account purſuant to the former decree, and to enquire what was really and *bona fide* due; *Lowfield* produced two other papers of the ſame import, though not of the ſame date with that given up. The maſter allowed them: and on his report, it came before the court; which to give further light to this affair, gave liberty to the repreſentatives of *Hall*, who died ſince the decree, to bring the preſent bill to be relieved againſt this demand of *Lowfield*, and to inquire into the legality of theſe papers.

For plaintiffs. It was inſiſted, that although it was proved, that part of the money raiſed on the bonds and notes was paid to *Hall*, theſe notes and bonds ſhould not be allowed as any evidence in the account to be taken, and *Lowfield* ſhould not be allowed any thing, of which he could not prove actual payment: that from the whole complexion of the caſe there appeared fraud and impoſition: and it was better he ſhould loſe ſomething of what he had advanced, than be paid all thoſe fictitious demands. (36)

For defendant. The evidence admitted by the maſter ſhould be concluſive; it is hardly poſſible to prove the actual payment of money, which is ſeldom done in *ſpecie*. In *Johnſon* v. *Johnſon* in the *Dutchy court*, there was a bill for foreclоſure of a mortgage: the defendant inſiſted the money was not paid: the plaintiff proved part, but could not prove all the conſiderations: an inquiry was decreed by Lord *Lechmere*, of what was actually paid: but that decree was reverſed in the Houſe of *Lords*, becauſe part being proved, though not the whole, and no fraud being proved, the *onus probandi* ſhould not lie on the mortgagee; fraud being not to be preſumed. It is dangerous to judge by the complexion of a caſe; and better even that the defendant ſhould be an unjuſt gainer, than the rules of evidence be infringed.

LORD CHANCELLOR.

Though it is truly ſaid, that the general complexion of a caſe is not ſufficient to overturn the rules of evidence: yet it is a reaſon for ſifting into the circumſtance, as far as is conſiſtent with the rules of the court: and here it appears very extraordinary, conſidering the objects on both ſides, that a man ſhould have his extravagance fed by ſuch

ſuch a perſon, in the circumſtances the defendant appears to have been in. But as that is poſſible, it is not ſufficient to determine the judgment of the court, as to the relief ſought, and to ſet aſide all the ſecurities; but that will depend on the weight of the particular evidence; and this objection is weakened by the proof made of the payment of part to *Hall*. This come on in an unuſual manner; not a bill of review, but in aid of an account directed generally by a former decree, to ſee what was due; with which, what the court now does, muſt be conſiſtent. It would have been difficult for the court to ſet aſide that firſt paper; for where a creditor or a plaintiff obtains by fraud or force, an inſtrument amounting to an admiſſion of the debt, the court cannot ſet it aſide on motion, but it ſhall be a ground for a new bill, though the former ſuit be depending: the order then made to the maſter prevented the bonds and notes from being concluſive evidence. It appeared very extraordinary, that on the defendants giving up that paper, two others of the ſame effect ſhould be produced, which would hinder the court from coming at the juſtice of the caſe; and therefore liberty was given to bring a bill for relief, with a view chiefly to ſhew fraud or impoſition in obtaining thoſe papers, that they might be ſet out of the caſe. And now upon the merits there appear great circumſtances of ſuſpicion, which yet is not ſufficient to found a decree upon. There is no proof of actual impoſition upon *Hall* who was very extravagant, and liable to be impoſed on in getting money; but that is not ſuch a weakneſs as proceeds from want of underſtanding: and therefore ſuch a perſon might put himſelf into ſuch a condition, as that the court cannot relieve him. As to the improbability that the defendant being in ſuch circumſtances, ſhould furniſh him with money; that had ſome weight, and induced the court to look into the real fact, although generally a perſon's circumſtances, as they may be private, are not to be ſo inſpected: but the defendant has made ſtronger proof than I expected, of his giving him money; which is not to be got over, whether done on his own ſole credit, or by the connection with *Hall*. Then as to the two papers; I cannot ſay that, when a perſon has conſented to lay one piece of evidence aſide, he ſhould be prevented from making uſe of another, if fairly obtained. I cannot ſet them aſide, or direct the maſter to allow of no ſum, which is not proved to be actually paid: the court ſometimes indeed does that; but not wantonly on preſumption or inference. It was done in the caſe of Sir *Oliver Aſhcomb* v. *Greenaway*, on full poſitive proof of fraud:

Admiſſion of a debt obtained by fraud or force, not ſet aſide on motion, but may be a ground for a new bill, the former depending.

(37)

On poſitive proof of fraud, court will direct allowance of no ſum not actually proved, paid.

fraud: but ſhould ſuch direction be given here, the defendant would loſe many conſiderable ſums actually advanced to *Hall*; for ſeveral of the witneſſes are dead, as is *Hall* himſelf; who if living, might be examined on interrogatories. And in the caſe of *Johnſon* it was a material ingredient in the reverſal of the *Lords*, that the party was dead. In 1727. By way of addition therefore to my former order, let plaintiffs be at liberty to falſify theſe two papers; and if they can ſhew, that ſome of thoſe notes, *&c.* were for the debts of the defendant, or for intereſt wrong computed, or ſo, they ſhall have allowance before the maſter, which will prevent the concluſiveneſs of the notes, *&c.* If a man will create evidence againſt himſelf by admiſſion, it is better that he ſhould ſuffer, than the rules of the court be overturned.

Stroud *verſus* Deacon, *Auguſt* 10, 1747. Caſe 22.

THE bill was to have a diſcovery of the defendant's title by ſetting forth a ſettlement by which he claimed, that his wife upon her marriage ſettled the premiſes to her ſeparate uſe, and that he is her repreſentative; the plaintiff alledging, that if that ſettlement was produced, it would appear, that ſhe was only tenant for life.

Demurrer to diſcovery of defendant's title under a ſettlement, in contradiction to which plaintiff claimed, over-ruled.

To this diſcovery the defendant demurred; becauſe the plaintiff does not claim under that ſettlement.

LORD CHANCELLOR.

As the plaintiff has made a title in contradiction to yours, he hath no right, generally ſpeaking, to look into your titles; but the bill charging that by producing this deed it will appear that her title was only for life: you muſt give ſome anſwer to it, and not barely demur, and what you barely know or believe is not ſufficient, but what it is by this ſettlement. You have not pleaded yourſelf a purchaſer ſo as to cover that; but have demurred to the whole, and it muſt be over-ruled. (38)

Shepherd *verſus* Cotton, *Auguſt* 10, 1747.

BY an act 34 *H.* 8. the eſtate of Serjeant *Hind* was charged with the payment of 10*l. per ann.* wages for thoſe who ſerved as knights of the ſhire for *Cambridge*: and for that purpoſe gave a corporation, conſiſting only of the two

Demurrer to a bill for payment of wages of knights of a ſhire, allowed.

two knights and the ſheriff, a right to enter and diſtrain. The plaintiff charges, that he has ſerved ſince the year 1724; that he applied for payment of it to the defendant, who refuſed; and the other members refuſed to join in the recovery of it: ſo that his only relief was in a court of equity. To which the defendant demurred.

For the demurrer. This is a mere legal right, if any. The plaintiff ſays, he is diſabled from ſuing at law by the refuſal of the other members to join: but the corporation is one body; and the plaintiff as one member might bring an action at law in name of the corporation; and then the defendant, ſuppoſing he had a right at law, could not have prevented his going on. But ſuppoſe he could not ſue at law, yet he ſhould not bring a bill againſt the defendant, but againſt the corporation for not joining: and then, if he had a right, the court would give him a remedy, by directing the other members to permit him to ſue in their name. To conſider it on the merits: this, like other ſtatutes, may be barred by the ſtatute of limitations. The plaintiff has not charged that it was ever paid; and deſuetude is a diſcharge thereof.

Againſt the demurrer. The only remedy is in equity: where one cannot ſue alone, it is a foundation to come here. The corporation acts by the majority; therefore one alone cannot carry any of the powers into execution. The ſtatute of limitations ſhould be pleaded, and is therefore out of the caſe: the corporation are only truſtees for the knights; and where by combination ſome members or truſtees refuſe, it is a colluſion proper for a court of equity to decree upon, and every demurrer admits the facts charged. If it was a matter of publick right, there would be ſome foundation for courts of law to interpoſe and grant a *mandamus:* but this concerns not public juſtice, but private property.

(39)

LORD CHANCELLOR.

This demurrer muſt be allowed, though not on the point of deſuetude; for our law does not admit that. The laſt member receiving ſuch wages was *Andrew Marvel*, in the time of *C.* 2. If a bill was brought here to recover ſuch wages againſt the inhabitants or electors in a borough, I would diſmiſs it, and leave the plaintiff to law. The queſtion is ſingly, whether the plaintiff has remedy againſt the defendant; for the demurrer puts the bill out of court as to that

that defendant only, ſtill remaining as to the reſt? Suppoſe the court ſhould order, that the plaintiff might proceed againſt the defendant to recover the wages, and the cauſe ſhould go on to a hearing: it muſt be diſmiſſed againſt the defendant with coſts; for otherwiſe he would be doubly vexed. Though a demurrer does generally admit every thing charged in the bill, yet it is not ſo here; this is a demurrer attended with an anſwer and denial of combination; ſo that no decree can be againſt the defendant; and I doubt, whether it can againſt the corporation. It ſo far concerns the public, as it concerns this county, and ſuch powers are proper to be executed by *mandamus* out of the *King's Bench*; which has authority to compel the execution thereof if ſtill in force: but that concerns the relief againſt the other members. Here is a clear remedy given at law, and the members of the corporation are to take that remedy; and the defendant is only ſubject, as the act has charged, by diſtreſs, *&c.* and I will not change the remedy; for the bill to compel ſuch a payment was never heard of. Whether he is intitled to make uſe of the truſtees names is another matter.

Richards *verſus* Evans, *& è con. Oct.* 26, 1747. Caſe 24.

THE plaintiff as rector brings a bill for payment of tithes in kind: the defendant as owner of the farm, brings a croſs bill for eſtabliſhing a cuſtomary payment of 7*l. per ann.* in lieu and ſatisfaction thereof.

Not neceſſary to uſe the word *modus* in laying it.

For plaintiff. This *modus* is neither well laid nor proved, nor is the day of payment certainly ſpecified; for want of which a *modus* was held not good in point of law in the *Exchequer*, *Trinity term* 5 *G.* 1. (c) becauſe the time of payment of a *modus* ought to be as certain as of the tithes, in place of which it is ſubſtituted; which as to the fruits of the earth is immediately on the firſt ſeverance; and a cuſtom uncertain is no cuſtom. Then the payment of ſuch a groſs ſum is an evidence againſt the *modus*, as too rank: for as every *modus* muſt be preſumed to commence before the time of memory, this many years ago muſt have been very near the value of the farm: it is therefore rather a modern compoſition, or rent for tithes.

Nor a particular day of payment.

A modus may be overturned for rankneſs, if for a ſpecific thing; if otherwiſe, will be ſent to trial.

LORD CHANCELLOR.

The objections to the laying the *modus* are of no weight; for neither in law or equity is there any neceſſity to uſe the

(c) 2 Vol. 514.

the word *modus*, as appears from all the caſes on this head, as in *Cowper* v. *Andrews*, *Hob.* 39. *Shelton* v. *Montague*, *Hob.* 118. and 1 *Ven.* 3. it being only a technical term not uſed in pleadings; in ſtating of which Lord *Hobart* was very accurate. The material words are *ſo much money* paid in lieu and ſatisfaction of tithes. As to the general queſtion, whether it is neceſſary to lay and prove a particular day of payment; the caſe in the *Exchequer* was certainly ſo determined: but I remember, that gave general diſſatisfaction in *Weſtminſter Hall* and abroad, as too nice to require the proof of a particular day; and it has been ſince adjudged to the contrary, that *on or about* is ſufficient; ſo that they have left off taking that exception in the *Exchequer*. Then it reſts on the merits; and that depends on the evidence on both ſides, which is of two kinds; firſt, of the fact and uſage of payment; ſecondly, ſuch as ariſes out of the nature of this *modus*. If it is turned on the firſt, it is the ſtrongeſt evidence I ever knew, againſt payment of tithes in kind, for which there is no proof on the part of the rector: that indeed, being only negative, would not prevail to take away the common right that is in the rector, if there was nothing more; but in ſupport of the cuſtomary payment there is the evidence of ſome *terriers*, which makes a diſtinction throughout, between this and the other parts of the pariſh, where tithes were paid in kind: and there is the rector's own admiſſion of this. As to the remaining objection to the *modus*, ariſing from the nature of it, as too rank, ſeveral indeed have been overturned on this point; but the diſtinction taken for the defendant is material, that a *modus* may be overturned for rankneſs, even at the hearing of the cauſe, where it is for a ſpecific thing, as a lamb, *&c.* becauſe the price of the thing may be found from hiſtory and ancient records: but that is an objection from a fact, which, becauſe it appears with ſuch a degree of certainty, the court determines without ſending it to be tried: but where it is not for a ſpecific thing, there are ſeveral other circumſtances to be taken into the conſideration of rankneſs; as the difference of value in the courſe of time. The Houſe of Lords therefore ſent a caſe of this ſort to be tried without over-ruling it. If this had come ſingly upon the rector's bill, it would without any ſcruple be immediately diſmiſſed; for that would not have hurt the ſucceſſion: nay, it would be open to the rector himſelf. But the owner bringing a bill alſo to eſtabliſh a *modus*, that would bind the ſucceſſors in the pariſh; and it being of conſequence, that a great part of the evidence ariſes from the rector's own admiſſion, if the defendant

Ante, *Carr* v. *Hall*.

Poſt. *Chapman* v. *Smith*, July 17, 1754.

ſendant inſiſts on eſtabliſhing it, the rector (unleſs he ſubmits to that decree) ſhall have an opportunity to try it at law.

Baines *verſus* Dixon, *October* 31, 1747. Caſe 25.

A Man having a ſon and a daughter, deviſes his manor of *Ryley* with the appurtenances, and all his other tenements and hereditaments, to truſtees and their heirs, in truſt for paying his funeral expences, debts, and legacies, as far as the perſonal eſtate ſhould be deficient: then for raiſing a maintenance and education, at their direction for his ſon *M.* and his daughter *S.* and all other younger children, whether born before or after his deceaſe, till his ſon attains twenty-three, and all other younger children reſpectively attain twenty-one: then all the ſurplus, as ſhall ariſe from the rents and profits to and among his daughter *S.* and all other younger children, as ſhall be then living, at their reſpective ages of twenty-one, and that the truſtees ſhould convey his ſaid manor, *&c.* to his ſon *M.* at twenty-three; he then gives ſome legacies to be paid after the debts with all convenience, as the profits of the eſtate ſhould advance the money.

A ſale directed on the words *rents* and *profits* alone, though generally contrary to teſtator's intent; in aid of a creditor on the ground of law, that in a will thoſe words meant and paſſed the land itſelf.

On a bill brought by the daughter a general account was decreed at the *Rolls*; and after the maſter's report it was directed, that a ſufficient part of the real eſtate ſhould be ſold for payment of the debts and legacies unſatisfied; with which part of the decree the defendant the ſon being diſſatisfied brought an appeal.

For plaintiff. There muſt be a ſale, for there is nothing to bind up the word *profits*, which is large enough to warrant a ſale, if nothing to confine it: the word *rents* being dropped in the latter clauſe: and this rule the court came into by ſeveral gradations, and will not break through without great reaſon. This was intended as a beneficial and effectual proviſion for all younger children; but the teſtator, being in debt, could not oblige the creditors to wait till the rents ſhould pay the intereſt and principal: and if ſo, there would be nothing for the children; ſo that an immediate ſale to pay the debts muſt have been intended. It is no objection, that by this means the proviſion for the daughter would be too large; for there might have been

been more younger children; and though that happened not to be the caſe, the court will not judge by ſubſequent accidents.

For defendant. The whole charge is to be raiſed in the ſame manner. The maintenance and education muſt mean annual: and no ſale can be for that: and the laſt clauſe ſhews, the teſtator could not intend it; for then he would have directed ſo much, as remained, to be conveyed to the ſon, and not the ſaid lands; *convenience* can only mean annual perception of the profits. In *Ivy* v. *Gilbert*, 2. *Wm.* 13. the court would not allow a ſale or mortgage, becauſe leaſes were mentioned. So here, there is a particular manner mentioned, by profits, with which intention he makes the minority longer.

(42)

LORD CHANCELLOR.

It is true that where there is no direction for a ſale, the court has gone by ſeveral gradations. When any particular time is mentioned, within which the eſtate would not afford the charge, the court directed a ſale: and then went further, till a ſale was directed on the words *rents and profits* alone, when there was nothing to exclude or expreſs a ſale. In *Ivy* v. *Gilbert*, the power of making leaſes excluded a ſale, as it would be frivolous, if a ſale was intended, which would include every thing. As to the intention, there is not one caſe in ten, where the court had decreed a ſale on the words *rents and profits*, that it has been agreeable to the teſtator's intention: yet the court has, in aid of a creditor directed a ſale, by a kind of diſcretionary power, on the ground of law, that *rents and* (f) *profits* in a will, mean to paſs the land itſelf: the teſtator intended this as a proviſion for all his younger children, and might have had more; which is an anſwer to the largeneſs of the ſum. The word *direction* in this will, means *diſcretion*. This deviſe to the truſtees is an uſe executed, but abſtracted from that nicety, the direction gives them the real eſtate; and a general truſt, not confined to the words *rents and profits*, would have carried a ſale, even before the reſolutions that thoſe words ſhould carry a ſale. It is but conjecture, that this is an implication, that debts and legacies ſhall be paid in the ſame manner. The word

(f) Deviſe of the profits, deviſe of the lands Poſt. 171.

ſaid,

ſaid, in the direction to convey, is to be taken according to the ſubject matter; and there have been many caſes of deviſes to truſtees, to pay debts out of profits, and then to convey the lands: yet that ſhall not hinder a ſale, and never has been thought ſufficient to limit *profits* to annual *profits*; which would overturn many caſes. The laſt clauſe relating to the legacies, is indeed a direction, that they ſhould be paid out of the annual profits, as it is ſaid for the defendant; but it is not the word *profits*, but *advance*, that limits it thereto. It is further ſaid, that the teſtator intended debts and legacies to be paid in the ſame manner; but the ſenſe of the words may be ſatisfied either way; and it would be extending the word *advance* too far to apply it to debts as well as legacies, for which conſtruction there can be no reaſon: ſo that a middle way muſt be taken, and a ſale directed for the debts, but the legacies to be paid as the rents and profits ſhould ariſe, with intereſt from a year after the teſtator's death: for they were general legacies and ſhould be paid with intereſt by the perſonal eſtate, if ſufficient: then the lands being only an auxiliary fund, do not vary the right.

Attorney General *verſus* Parker, *Nov.* 4, 1747. Caſe 26.

THE pariſh of *St. James's Clerkenwell* was a rectory impropriate, and by deed in 1656 veſted in truſtees for benefit of the pariſhioners and inhabitants and their ſucceſſors: there was alſo a perpetual curacy with a penſion: ſaying nothing of the nomination and election of the curate. The information prayed the court to ſet aſide an election made, and then to declare and eſtabliſh the general right of election, and to have it ſettled.

LORD CHANCELLOR.

The queſtion concerning the right of election, and qualification to vote, depends on this deed of truſt, and on the uſage in the pariſh, expounding and putting a conſtruction on the general words thereof; which is the beſt expoſitor of ſuch very large and general words in ancient grants and deeds. There is no evidence of the uſage contended for by the relators, that it is confined to ſuch houſekeepers as paid ſcot and lot; however that would be proper, if there was no evidence of any uſage at all; but as there is, it differs from the caſe of the *Attorney General* v. *Davy* heard before

Right of voting for a curate not confined to houſekeepers rated.

Poſt.

before me: for there is very ſtrong evidence, that all houſe-keepers whatſoever, as well rated as not, did uſe to vote; and that it has been always ſo taken by the oldeſt inhabitants. Then to confine this right to election would be a very arbitrary interpretation of the court, and a material circumſtance is the time of making this deed; when very large and extenſive notions prevailed. It it ſaid, this muſt be taken to be a right in the veſtry; but this is not governed by what is the right of the veſtry; nor intended to be veſted in them, but in the pariſhioners, though there was a ſelect veſtry at the time of the making: nothing is laid before the court to ſet aſide the election made. As to the queſtion, whether the court ought not to make a decree to ſettle the right, for that, being a charitable uſe, the information ſhould not be diſmiſſed: the general rule is ſo, but does not hold here; for nothing is a chargeable uſe here but the penſion, which is not in queſtion. But there is no ground to eſtabliſh this right, as there is no proof or examination entered into of it; nor will the court, at the ſuit of a few of the pariſhioners, put the pariſh to the expence of an iſſue to ſettle a right, which may not come in queſtion in ſeveral years. The whole of this information muſt be diſmiſſed with coſts. (g)

Poſt. Attorney General *v.* Scott. Information for charity not diſmiſſed, but the right ſettled.

(44) Caſe 27.

Hodgſon *verſus* Rawſon, *November* 6, 1747.

A legacy out of real eſtate to be paid within 12 months after death of *A.* legatee ſurvives *A.* but 1 month; it does not lapſe, but goes to the repreſentative.

JEREMIAH HOLLINS in 1738, deviſed part of his real eſtate for payment of debts, the ſurplus to his mother, and another part to his mother for life; and afterwards to his dear couſin *William Rawſon*, his heirs and aſſigns; he and they paying thereout legacies to ſeveral perſons, which ſums he willed to be paid within twelve months next after his mother's deceaſe; charging his lands therewith accordingly. Then he gives all his houſehold goods and furniture to his mother for life, and after her death to his couſin *Rawſon*, his executors and adminiſtrators, if he ſhall be living at his mother's death: but if his mother ſurvived, then to her, her executors and adminiſtrators. (h)

After the teſtator's death the mother entered, and poſſeſſed the real eſtate, and died in 1744; a legatee of 100*l.* ſurvived her but one month; his executors bring this bill for the legacy againſt the deviſee of the real eſtate, who was not the heir at law. For

(g) Vol. 2. 328. Poſt, 72.

(h) The general rule is, that charges on land payable at a future day, ſhall not be raiſed where the party dies before the day of payment, but there are exceptions where payment is poſtponed for particular circumſtances. Vide all the caſes collected on this ſubject in 2 Wms. 612, 4th. Ed. Note 1.

For plaintiff. This legacy was ſo veſted in the plaintiff's teſtator in his life, as to be tranſmiſſible to his repreſentative, though the payment was ſuſpended to a future time: it would indiſputably be ſo, if it came out of a perſonal fund; indeed the general rule is, that where it comes out of a real fund, it lapſes by the death of the legatee before the time. But there are ſeveral reſtrictions thereto, as where the time of payment is diſtinct from the gift; which is a diſtinction the court has always taken, and this caſe therefore differs from *Hall* v. *Terry*, *November* 9, 1738, which was a deviſe of land to a nephew, his heirs and aſſigns, if he ſhall pay ſome legacies, within a year after it comes to him by the death of the teſtator's widow, on whom it was ſettled by marriage; charging the premiſſes therewith accordingly: a legatee died in the life of the widow; his repreſentative brought a bill for it, as being a veſted intereſt. Your *Lordſhip* held, that neither the diſtinction or authorities made for the plaintiff; for that the time of payment was annexed to the gift, and the charge on the land was only according to the gift, and that the legatee died not only before the time of payment, but before the veſting, and therefore it ſhould lapſe. But here the time of payment comes in a ſubſequent part of the will, and diſtinct from the gift. Another diſtinction, upon which the court has gone, is, where the contingency muſt certainly happen, and where it may not; for in the latter caſe it never veſted: as was determined in (i) *Atkins* v. *Hiccocks*, *July*, 18, 1737, which was a deviſe to a daughter of 100*l*, payable at the time of marriage, or three months after, if ſhe married with conſent, and 12*l*. *per ann.* till it was paid: the daughter died unmarried: it was held not to be due; for the contingency being uncertain whether it would come or no, the teſtator did not regard the time, but the event, which was the marriage: but that is not (45)
applicable here; for it was certain this time would come, and it was no queſtion with the teſtator, whether the legacy ſhould be paid or no. Then the ſuſpending the payment does not vary the right of the party already veſted; but was only in favour of the deviſee, to give him an opportunity to raiſe it. This diſtinction of ſuſpending in favour of the legatee or deviſee, was held proper in (‡) *Sherman* v. *Collins*, *February* 4, 1745, which was a deviſe of 300*l*. a-piece to two daughters, to be paid by his executor when he attained twenty-ſix, charging two cloſes

(i) 1 Atk. 501. (‡) 3 Atk. 319.

therewith ; and both daughters died, before the executor's attaining twenty-ſix. But where the circumſtances of ſuſpending were on the part of the legatee, it was a reaſon of bringing it within the general rule of not being tranſmiſſible ; but the ſuſpending here was an abundant caution in favour of the mother, that ſhe ſhould have the whole ; and that there ſhould be no diminution, till it came to the deviſee over. *King* v. *Withers*, *Talb.* 117, is ſtronger than this caſe ; for there, though the contingency was uncertain, yet it was held veſted and tranſmiſſible ; the event in the teſtator's view having happened. In *Lowther* v. *Condon* there was a deviſe, after having given 500*l.* a-piece to two daughters, of a further ſum of 1000*l.* a-piece to be raiſed and paid them immediately after the death of the wife. One daughter died before the wife ; and though the general rule took place againſt her repreſentative ; yet your lordſhip held, that the circumſtance of payment after the mother's death was in favour of the fund, and it ſhould be the ſame as if out of perſonal eſtate. The caſe of *Eulkely* v. *Stanlake* is an authority, that a contingent intereſt is tranſmiſſible. *Hutchins* v. *Fey*, *Comyns* 716, is alſo an authority, that a legacy is tranſmiſſible, though the legatee died before it was payable : and it is material here, that in the deviſe of the perſonal eſtate, where the teſtator intended the legatee ſhould not have it, if he died before, he has expreſsly ſaid it.

For defendant. According to the general rule this legacy lapſed and ſunk into the eſtate by the legatee's dying within the year after the mother's death ; which rule, though at firſt it might ariſe on a particular occaſion in *Powlet* v. *Powlet*, 2 *Ven.* 366, and 1 *Ver.* 204, 321, has ſince become general in a charge upon land ; as it is in this court, even without the expreſs words, and the *eccleſiaſtical* court is followed here only in a charge on perſonal eſtate. One exception to the general rule is, where there are two times of payment : one regarding the contingency of the perſon of the legatee, the other regarding the fund ; which was the caſe of *King* v. *Withers*, where the time regarding the perſon having come, the court held it tranſmiſſible, though the other event had not happened. A ſecond exception is, where from the other words in the (46) will the teſtator meant it ſhould not ſink into the eſtate ; and that was the ground in (l) *Lowther* v. *Condon*

(l) 2 Atk. 133.

which caſe has not been cited wholly; for it was to their reſpective executors, adminiſtrators, and aſſigns, if one daughter died before; and expreſſed to be for benefit of the ſurvivor, not to ſink for benefit of the heir. A third exception has been attempted, which the court will not admit; the diſtinction of the legacies being poſtponed from reaſons regarding the perſon and the fund. If this caſe is not within the general rule, it muſt be on one of theſe two grounds: firſt, that ſuppoſing the legatee has died in the life of tenant for life, it ſhould be raiſed; but then it would be a direct contradiction to *Hall* v. *Terry*; for there is no difference between *ſo as he ſhall pay* and *he paying*; and there the court clearly thought, that if the legatee had died in the life of tenant for life, it ſhould not be raiſed; for the court ſo thought, though the legatee ſurvived. So would it contradict *Bradly* v. *Powel*, *Talb.* 193. The ſecond ground muſt be that there was ſuch an inchoation of right, by the legatee's ſurviving one month, as to make it payable: but the court has not gone upon that, and never conſiders the legacy payable till compellable, which it is not here, though the deviſee might pay it ſooner. (m) *Hall* v. *Terry* is in point; it was objected there, that it was an abſolute gift, but the time of payment poſtponed; the court held that immaterial; for in reſpect of land, that objection never was made. (n) *King* v. *Withers* was there cited, but the court diſtinguiſhed it, becauſe of a double time of payment, one of which had happened; and here there is but one time of payment. (o) *Van* v. *Clark*, 21 *July* 1739, (cited in *Comyns*) is alſo in point; where your lordſhip held, that a legacy out of real and perſonal eſtate to be put out to intereſt, and paid at eighteen or marriage, ſhould not go to the repreſentative of the legatee dying before. (p) *Sherman* v. *Collins* turned on very particular circumſtances; and there was a clauſe of entry given to the legatee, on which he might maintain an ejectment: and ſo it is to no purpoſe to argue it on this rule; nor are the other caſes to be taken in the latitude contended for.

December 9, 1747. Lord *Chancellor* having taken time to conſider of it, pronounced his decree. Conſider firſt how it would ſtand at law: then how it ſtands in and is

(m) 1 Atk. 502.
(n) Talb. 117.
(o) 1 Atk. 512.
(p) 3 Atk. 319.

altered

Heirs not named may take advantage of a condition.

altered by equity. As to the firſt. Taking it as a conditional or contingent legacy, it is clear that the executors may have the benefit of it; as in *Sal.* 170, where the condition of an obligation was to make a leaſe, or pay 100*l.*: the obligee dying, though the election was taken away, it was held, that his executor ſhould have the 100*l.* which determination is agreeable to the rule of law in caſes of heirs; where the heir though not named, may take advantage of a condition annexed to a real eſtate. In *Marks* v. *Marks*, *Equity Ab.* 106, there was a condition to gain an eſtate, on payment of money in a limited time; the party died before the time, his heir was relieved. 2 *Ven.* 347 cited in *King* v. *Withers*, was decreed on that ground, that a contingent intereſt is tranſmiſſible to the repreſentative. Thus it ſtands at law with reſpect to the plaintiff. With reſpect to the defendant it was a deviſe on condition of paying; for the deviſee not being heir at law, but a ſtranger, it was a direct condition, not a conditional limitation. Therefore *Wellock* v. *Hamond*, cited in *Boraſton*'s caſe, 3 *Co.* 19, is not like this: there it was a conditional limitation. Here is no occaſion to go by that circuity, being a deviſe to a ſtranger, and a condition, of which the teſtator's heir at law muſt take advantage; who may bring an ejectment againſt the deviſee for a breach in not paying, ſince at law the benefit of the contingency is tranſmiſſible. Then the teſtator having expreſsly created a charge on the land, it will bind the land in the hands of the heir, after his recovering in ejectment.

(47)

Contingent intereſt tranſmiſſible.

Conditional limitation.

Where legacies ſink: where tranſmiſſible

Then as to the alterations in equity: the general rule is, that a legatee dying before the legacy is demandable, it ſhall ſink into the eſtate. But here being a plain right at law, and the land recoverable for nonpayment; it would be ſtrange to deprive the legatee of it, and repugnant, that the deviſee ſhould loſe his land for nonpayment; and yet the legacy itſelf loſt in equity. The general rule in *Pawlet* v. *Pawlet*, and a *multitude* of caſes is the ſame; whether it is at the day, or payable at the day; that diſtinction being admitted only in perſonal legacies. (q) The intent was, that the legacy ſhould veſt, as ſoon as the remainder came into poſſeſſion, it being *he and they paying thereout*; which could not be, till they were intitled to the profits: but it was alſo intended to give the remainder man a year's time. The teſtator muſt have had in view

(q) Poſt. 237. 8 Vin. 112.

the

the legatee's dying in the mother's life, having expreſſed it afterward, where he intended it ſhould defeat the legacy; which not having done here, it is an evidence of his not intending it: and the defendant's counſel admit there are caſes, where the intent will controul the general rule; as in *Lowther* v. *Condon*.

As to authorities, the firſt is, *King* v. *Withers*. The ſecond, *Bulkeley* v. *Stanlake*, and (r) *Hutchins* v. *Foy*, which was a bill not brought in the *Exchequer* for a legacy charged on an eſtate, as adminiſtrator to the wife, who died before the legacy was payable. It was held to be tranſmiſſible on this ground: that the remainder veſted immediately by the death of the teſtator; and therefore the legacy veſted in thoſe, to whom payable, and that the deviſee muſt take it *cum onere*; it being equally intended that the legacy ſhould be paid, as that the deviſee ſhould have the eſtate; which is the ſame here, and the eſtate recoverable for a breach. Theſe caſes are ſtrong authorities, that the eſtate is chargeable, notwithſtanding the death of the legatee in life of the tenant for life, and before the remainder attached in poſſeſſion; but there is ſomething more here, *viz.* that this twelve month clauſe was not intended to ſuſpend the veſting, and make it contingent; but only as a reaſonable time to the deviſee for payment, which he could not do, before he was poſſeſſed: (48) and there is a caſe upon that ground only, which is *Wilſon* v. *Spenſer*, *January* 31, 1732, where the teſtator deviſed the payment of his debts and legacies by and out of ſuch part of the perſonal eſtate, as ſhould not afterward be ſpecifically deviſed; and if that proved deficient, then out of the real eſtate: and that his executor ſhould within twelve months after his death levy and raiſe ſufficient to pay 1000*l.* to the younger ſon, to be paid to him immediately when raiſed; charging all his real eſtate, if the perſonal eſtate not ſpecifically deviſed proved deficient. The younger ſon died before the expiration of the year: his executors bring a bill for it againſt the eldeſt ſon the deviſee, for life, of the real eſtate with a remainder to his ſons. The defendant admitted it was intended for his brother's advancement; but inſiſted, that he dying unmarried before, it was extinguiſhed, and not to be raiſed: the perſonal eſtate was admitted to be deficient, and it was therefore chargeable on the real eſtate, and to take

(r) 1 Brown 191.

the

the fate of a legacy out of real eſtate, as it has been decreed. The court held, it ſhould be raiſed: which is an authority, that the year for raiſing was not ſufficient to prevent the legacy's veſting; and was the ſingle ground of that determination. *Hall* v. *Terry* is diſtinguiſhable from this: there I thought, that as to the penning of that legacy, the time was annexed to the gift or ſubſtance; and though it had been out of perſonal eſtate only, it would not be tranſmiſſible. So it was likewiſe in *Van* v. *Clark*, and therefore the court, which favours real eſtate, will never hold a legacy tranſmiſſible, which would not be ſo if payable out of perſonal eſtate only. But whether thoſe caſes are applicable or not, this twelve months time given is a ſufficient ground for this decree within the authority of *Wilſon* v. *Spenſer*; therefore this legacy muſt be raiſed and paid with intereſt at 4 *per cent.* from a year after the mother's death, and the plaintiff muſt have coſts; ſo decreed in *Wilſon* v. *Spenſer*: though there was more doubt.

N. In the cauſe Lord *Chancellor* ſaid, that there was no caſe, where the court has by way of rule laid down the diſtinction between ſuſpending the payment with a view to the perſon of the legatee and the fund: though there were caſes, where it has come with other circumſtances.

Caſe 28. Meriton *verſus* Hornſby, *November* 9, 1747.

Maſter has a right to earnings of his apprentice who quits him.

THE bill was brought by an apprentice, who had with conſent of his maſter quitted his ſervice to go on board a privateer; to be relieved againſt a claim made by the maſter to the plaintiff's ſhare in a great prize the *Marquis d'Antin*, and to have that ſhare paid by the managers to him.

(49)

Lord *Chancellor* ſaid, ſuch actions were very common at law by maſters againſt their ſervants, who had quitted them to go to ſea; in which the maſters recovered their earnings; ſo that the maſter's right being ſtrictly legal, let him bring an action at law, in what court he will, for this ſhare againſt the managers; in whoſe names the apprentice ſhould be permitted to defend it.

Hill v. Allen Poſt 83. *Feb.* 3, 1747. 8.

(s) 2 Atk. 132. (t) 3 Atk. 319.

(u) Where maſter covenants to the diſcharge of his Apprentice, Bill will not be for a return of the Fee; 2 Brown 78.

Sibthorp

Sibthorp *verſus* Moxton, *November* 10, 1747. Caſe 29.

A woman forgives a debt to her ſon-in-law in a will, and deſires her executor to deliver up the bond to be cancelled; it is not lapſed by his dying before the teſtatrix.

THE teſtatrix gives ſeveral legacies among her children; and then ſays "I likewiſe give my ſon-in-law *Chillingworth* a debt of 500*l.* he owes me on a bond and intereſt; and deſire my executor to deliver it up to be cancelled." *Chillingworth* died inteſtate in the life of the teſtatrix leaving her daughter his widow; who took out adminiſtration, and brought this bill againſt the repreſentatives of the reſiduary legatee to have the bond delivered up.

For plaintiff. The general rule, of a legacy's lapſing by the death of the legatee in the life of the teſtator, is not applicable here; the teſtatrix intending by her will that the debt ſhould be extinguiſhed; which muſt neceſſarily go to the repreſentative of the debtor; for it is not like a gift of a ſum of money. A will may be ſo penned, as that though the legatee dies before the teſtator, yet his repreſentative ſhould have it; for though at law a debt cannot be releaſed by will, yet in equity the intent to diſcharge it will be conſidered. *Elliot* v. *Davenport*, 1 *Wm.* 83. 2 *Ver.* 521, is in point; for it was admitted there, that if the deviſe over of part of the debt had not ſhewn it was not intended to work by extinguiſhment, it would not have lapſed.

For defendant. This is of a legatory nature, and therefore lapſed within the general rule; for a will cannot releaſe a debt. 1 *Ven.* 39. 1 *Sid.* 421, as it cannot take effect till the death of the teſtator, and the neceſſity of having the executor's aſſent to make it good, proves it a legacy. The intent of the teſtatrix may controul the general rule; but it muſt be very plain, and the penning very ſpecial. *Elliot* v. *Davenport* is a ſtronger caſe for the defendant; in whoſe favour the determination there is. Here it is not given to him, his executors and adminiſtrators, as there; the only perſon deſcribed to take being the ſon-in-law, and the bounty deſigned perſonally to him; who was alſo the ſole object of the view of the teſtatrix in the latter clauſe, which is dependent on the former, that it ſhould be delivered up to him, if the legacy took effect. The reaſon of lapſing is that otherwiſe it might go to a far different perſon than was intended: there is nothing importing a general remiſſion, but only to that particular legatee; and the court cannot ſupply a new one.

LORD

LORD CHANCELLOR.

I muſt begin with ſaying, as Lord *Cowper* did, that this is a very doubtful caſe; yet I am of opinion that the plaintiff ought to have the benefit of this diſcharge of the debt, and that the bond ſhould be delivered up to be cancelled: the teſtatrix was a mother providing for the different branches of her family; and it would be very harſh, if it ſhould happen by the conſtruction of this will, that the rule ſhould be ſo ſtrict, that by the ſon-in-law's death her daughter, ſo nearly related in blood, ſhould loſe the benefit intended to this branch. It is truly ſaid for the defendant, that giving or forgiving a debt to the debtor is a teſtamentary act, and to be conſidered as a legacy with regard to the adminiſtration of aſſets, and therefore cannot take effect but by the aſſent of the executor; for creditors may have a right to it upon a deficiency: but it is otherwiſe as to a diſpute with the executor, or a voluntary claimant. It is alſo truly ſaid for the defendant, that it cannot operate as a releaſe, and the obligor could not plead it ſo in an action by the executor; yet in equity it is conſidered as an extinguiſhment, though it wants the form of a releaſe: and this court would in ſuch a caſe grant an injunction againſt the executor, if it was not wanted to pay debts. To *deſire*, in a will is the ſame as to *direct*; and it is admitted at the bar, as in *Elliot* v. *Davenport*, that the latter part, if it ſtood alone, would be a diſcharge, though the legatee died before; but it is objected, that this is ancillary to the former clauſe, ſo as it will not prevent the lapſe; and it is capable of that conſtruction. But the queſtion is, what conſtruction the court ought to put upon it? which is that it is not merely ancillary, but a further declaration of the intent of the teſtatrix, that at all events the bond ſhould be delivered up and extinguiſhed in whoſeſoever hands; which makes it plain, agreeable to the admiſſion above mentioned; and to conſtrue the intent otherwiſe, would be leaſt for the benefit of the family. As to the caſe of *Elliot* v. *Davenport*, there was ſome colour for its being cited on both ſides: but there is an expreſs giving to, not a forgiving of the debtor; which it is truly ſaid generally makes no difference: but not ſo there, where it was not intended to be a releaſe, but that the recognizance ſhould ſtill ſubſiſt as a ſecurity to the children till paid; which makes it materially different from this caſe, where the intent plainly was to forgive the debt, and that the bond ſhould be delivered up abſolutely. Nor is

there

there any thing in the difference, where the remiſſion is general, or to that particular legatee; for it would make a bounty intended for a family very precarious, ſhould the court go on ſuch nice diſtinctions.

But no coſts in this caſe.

Leman *verſus* Newnham, *November* 11, 1747. Caſe 30.

SIR *William Leman* poſſeſſed of a real and perſonal eſtate the real incumbered by ſeveral mortgages of his anceſtors, made his will, in which he ſays, "I deſire all my debts may be diſcharged by my executors; I mean thoſe only of my own contracting: not thoſe heavier debts charged by my family." He then gives ſeveral legacies, and then his perſonal eſtate to his mother, whom he made executrix; deſiring her to pay all his juſt debts exactly.

Long after the making the will the mother brought in thoſe ſeveral mortgages, which were aſſigned to her, and for the payment of which the ſon entered into a covenant. He died in 1741, and there had been no payment or demand of principal or intereſt for twenty years. In 1744, the mother brought a bill againſt the preſent plaintiff and defendant, who are the coheirs at law of her ſon, for payment of thoſe mortgages, or elſe that they ſhould be foreclоſed: but ſhe dying makes one of the coheirs her executor: who gets his name ſtruck out of the original; and now brings a bill of revivor againſt the other coheir, for a ſale of mortgaged premiſſes, that out of the money ariſing thereby, the principal and intereſt due ſhould be paid by the defendant; the plaintiff claimed by a double right, as executor of the mother, who ſtood in the place of the mortgagee, and as coheir of her ſon.

Maſter of the Rolls, Sir *William Forteſcue*:

Waving the objection to the manner of bringing this bill, and conſidering it on the merits, it is a proper bill, and a proper relief may be given. It is truly ſaid, that the plaintiff coming here for equity ſhall be obliged to do equity; and that equity is, that if the court directs the payment of the mortgage money to him, he muſt bear an equal ſhare in the burthen, he having a moiety of the land.

There

There are two principal queſtions here: the firſt is, whether theſe mortgages are ſtill ſubſiſting, or ſatisfied? next, if ſubſiſting, out of what fund they are to be paid?

Where no demand of principal or intereſt for 20 years, ſatisfaction will be preſumed: except in caſes of mortgages; mortgagee is ſuppoſed continuing in poſſeſſion, and mortgagor tenant at will to him.

As to the firſt, the defendant inſiſts, that there being no principal or intereſt paid or demanded for twenty years, the preſumption of law is, if nothing elſe, that they are ſatisfied: and that twenty years is the proper time of limitation both in law and equity; as in bringing an ejectment. And in common caſes it is ſo; but not in mortgages, becauſe the mortgagee ſhall be ſuppoſed continuing in poſſeſſion and the mortgagor's poſſeſſion ſhall be his, being tenant at will to him. It is ſaid that in caſe of a bond, (x) where for twenty years neither principal nor intereſt was paid, a jury will of courſe find it ſatisfied; and that it were abſurd, where a bond is a collateral ſecurity for a mortgage, that the bond ſhould be found ſatisfied, and the mortgage ſtill due. But that would not be the caſe, for in an action on the bond, if the jury were not convinced that the mortgage money was paid, they would not find the bond ſatisfied: but if the court was ſatisfied that the money was paid, they would not ſuffer the mortgagee to bring an action on the bond; which brings it to the queſtion, whether it was paid or no; and it is certain that nothing has been ever paid. If it ſtood ſingly on the twenty years elapſed, and no evidence either way, it would be very difficult for me to determine ſo large a ſum to be ſatisfied, without putting it in ſome way to be tried: but there is no evidence of its having been paid; and ſtrong evidence that it never was. If the money never was paid to the mother, yet if ſhe had given it up to the ſon, it would have been a ſatisfaction; and her bringing that bill would not have revoked it: but the fact appears otherwiſe, and ſhews the reaſon why no principal or intereſt was ever paid; for her intention was not to demand it in her ſon's life, yet not to part with her whole right, but keep it in her power; and therefore would not have the

(52)

(x) In ſuch caſe the Judge will direct the Jury to find it ſatisfied; 2 Atk. 144: 20 years without any demand is of itſelf a preſumption that a bond has been paid; Lord Mansfield ſaid, there is a diſtinction between length of time as a bar, and where it is only evidence of it, the former was poſitive, the latter only preſumption; in ſuch caſe no time had been expreſsly laid down by the Court, it might be 18 or 19 years. Durnford and Eaſt, 270, 272: 1 Burr. 434: In 4th Burr. 1963 Lord Mansfield ſays 20 years without demand is a good preſumption of payment: In Finch, 77, perpetual injunction granted againſt a bond of 56 years ſtanding:

mortgage

mortgage deeeds delivered to him: and though this is parol evidence, it is not to ſet aſide, but in ſupport of a deed, and deſtroys the preſumption ariſing from length of time. So that theſe are ſtill ſubſiſting mortgages.

As to the ſecond queſtion; the defendant inſiſts they ſhould be paid out of the perſonal eſtate, as the proper fund for payment of mortgages: and that though the mortgagee may come on the lands againſt the heir at law, he may have remedy againſt the perſonal eſtate; which is the general rule. To this the plaintiff replies; that this differs from the common caſe; the mortgages being originally the debt of the teſtator's anceſtors, whoſe eſtate, having received the advantage of the mortgage money, ſhould bear the burthen, and not the eſtate of the teſtator: for which purpoſe two caſes occur to me, *Bagot* v. *Oughton*, 1 *Wm.* 347, and *Evelyn* v. *Evelyn*, 2 *Wm.* 659; where this court went ſo far as not to make the heir's perſonal eſtate liable, becauſe it was originally the debt of his anceſtor; though there was a particular covenant on his part, and the equity of redemption in him. It is ſaid, that though this is ſo, where the heir of the mortgagor takes an eſtate tail or for life, yet it is not, where he is tenant in fee: and that in the preſent caſe it is the ſame, as if it deſcended to him as heir at law; in which caſe the covenant ſigned by him cannot be collateral ſecurity, as he cannot be ſecurity for himſelf: to which it is replied, that it did not deſcend to him. But I ſee no difference, where the equity of redemption deſcends to the heir at law in fee, or where the legal eſtate incumbered with ſeveral mortgages deſcends to him in fee.

Teſtator deſires all his debts may be diſcharged by his executors; adding "I mean thoſe only of my own contracting, not thoſe heavier debts by my family;" gives his perſonal eſtate to his mother, whom he makes executrix, deſiring her to pay all his juſt debts exactly. Long after making the will the mother buys in mortgages charged on his eſtate by his anceſtors, and the ſon covenants to pay the money. The perſonal eſtate is ſtill exempted from the principal and intereſt due on thoſe mortgages, which are ſtill a charge on the real.

But the will is the proper rule to go by, as far as it directs; by which it is agreed he had a power to charge his real or perſonal eſtate with theſe mortgages; ſo that the queſtion

(y) Pree. Ch. 2, 101. 456, 477. 2 Vern. 701. 1 Wm. 291, 347: 2 Brown 101. In this and ſome other caſes the Perſonal was held not to exonerate the real, but theſe were determined upon particular circumſtances which took them out of the general rule, which always takes place, unleſs the real eſtate is from the nature of the contract primarily liable, and then no collateral ſecurity, ſuch as covenants, &c. ſhall alter the fund; 2 Salk. 449. 4 Mod. 12. Poſt. 251. 312. vide 2 Wm. 664, 4th Ed. Note 1, where all the caſes on this head are collected.

queſtion is, whether, and how far, he has done it? It is inſiſted, that the perſonal eſtate being the proper fund, it cannot be diſcharged without particular words: and therefore, though there be a direction for payment of debts out of the real eſtate, that ſhall not change the fund, but it ſhall only make good any deficiency of the perſonal eſtate. That this is the general rule, but here there are expreſs words of exemption: it is ſaid, that though there is this exemption in the firſt clauſe, it is not in the latter, where he directs all his juſt debts to be paid exactly. In anſwer to which, it is a conſtant rule, that one part of a will is not to be conſtrued contradictory to another, if both will ſtand: and where the teſtator has ſo particularly explained what he meant by his debts, it would be hard to give it a different conſtruction. It is farther objected, that the mother's buying in thoſe mortgages, and the ſon's covenanting for the payment of them, was after the making the will, whereby he made them his own debts, and they no longer came within the deſcription of his *heavier family debts*. But the will muſt be made to ſpeak from the teſtator's death, and be looked upon, not only as his laſt will, but laſt words: ſo that where a will charges a real or perſonal eſtate with debts; any debts contracted after, are equally liable to be paid. Wherefore though by the covenant he makes himſelf liable to her repreſentative, yet that does not vary the deſcription of the thing given by the will. So that the teſtator having diſcharged his perſonal eſtate, they are a charge upon the real: and only thoſe contracted by himſelf charged on his perſonal eſtate: this alſo determines the objection as to the intereſt, which was ſaid to become his own debt; but that as well as the principal is within the deſcription of heavier debts; for it would be ſtrange to charge them upon ſeparate funds.

Nov. 13. 1747. An attachment for non-appearance was taken out before the bill was entered in the bill-book, though filed in the Six Clerk's office.

Lord *Chancellor* ſeemed to think an entry in the bill-book neceſſary to give the party notice; for private notice to his attorney is not ſufficient: but being doubtful of the courſe of the court, he referred it to a maſter.

(54) It is not the practice now, as formerly, to take out a *ſubpœna* before the bill is filed.

Walker

Walker *verſus* Walker, *November* 17, 1747. Caſe 31.

A Man, in conſideration of his marriage, and to make ſome proviſion for his wife, by deed executed before the marriage, ſettles upon her, if ſhe ſurvives him, part of his real eſtate for her jointure and in full bar and recompence of all dower or thirds which ſhe can be intitled to or any way claim out of any lands, tenements, meſſuages, or hereditaments, of which he now is or ever after during the coverture ſhall be ſeiſed of freehold or inheritance. He having afterward purchaſed copyhold eſtates, ſhe upon his death gets into poſſeſſion of them as her *free bench*.

Covenant by deed before marriage to ſettle on wife, if ſhe ſurvive, part of the real eſtate for her jointure, and in full recompence of all dower or third which ſhe can any way claim, *&c.* out of any lands, *&c.* of which he is, or ſhall be ſeiſed of freehold or inheritance: ſhe is hereby barred from claiming as her *free bench* copyhold purchaſed afterward.

The heir at law brings a bill for an account of the rents and profits thereof againſt her, as being barred thereof by the deed; and it was argued for the plaintiff, that the word *inheritance* was not oppoſed to an intereſt for life, but meant to take in every other kind of inheritance, which the huſband might have, ſuch as copyhold; the word *freehold* before, meaning freehold inheritance.

For defendant. Thoſe words were never ſo oppoſed before, if that was the meaning, *copyhold* would be expreſſed; as it muſt in a general deviſe of land; otherwiſe it will not paſs. A proviſion of copyhold for a wife is never called *dower*, nor is *free bench* a cuſtomary dower; it being in the huſband's power, and depending on his dying ſeiſed thereof; and it could never be intended to include in the treaty what it was uncertain, whether ſhe would ever be intitled to: the words *ſome proviſion* expreſſed, that ſhe was not to be excluded from any other, that might afterwards be left her. The plaintiff has precluded the defendant from proving declarations and an intention to provide farther for her, by not replying to the anſwer; which therefore muſt be taken to be true in all its parts.

LORD CHANCELLOR.

The plaintiff's coming here is an admiſſion that the law is againſt him, for otherwiſe he ſhould have brought an ejectment; and it is ſo, for the ſtatute 27 *H.* 8. does not extend to copyholds; all the clauſes expreſsly relating to dower

Poſt.

dower at common law: but for *free bench* no writ of dower lies; being only an excreſcent intereſt out of the huſband's eſtate; but upon this ſettlement the plaintiff is intitled to
(55) relief. There are ſeveral caſes, where by proviſion of the huſband, a wife may be barred of dower, where the common law would not bar her; as out of perſonal eſtate, if ſo framed as to import a jointure, whether expreſſed or no; which the court does by way of enforcing the agreement of the parties, and to prevent double ſatisfaction. It was ſo decreed by Lord *Somers*, 2 *Ver.* 365, which indeed was reverſed by the Lords; for that in a bare deviſe of land, without more, the court will not intend it to be in bar of dower. But in a late caſe before Lord *King*, of *Vizard* v *Longdale*, on a bond before marriage for the wife's livelihood and maintenance, it was held a ſatisfaction, though the word *jointure*, was not uſed; the reaſon of which extends to the preſent caſe; which is very ſtrong to bar her. The circumſtances of his being a very old man, and marrying a young widow who made a very prudent bargain for herſelf, will not influence here. If it had gone no farther than the word *jointure*, I ſhould have thought it intended to bar her, not only of what the ſtatute would bar her, but of any other demand as a widow. Suppoſe it were only articled before marriage, that it ſhould be for her jointure, and not carried into execution: on a bill for performance the court would bar her of free bench as well as dower. This is ſaid not to be dower, and it certainly is not thirds; being a claim of the whole: but it is ſomething analogous to dower; therefore though not ſtrictly within the words, it will be proper to give it a liberal conſtruction. Dower is alſo, as well as free bench, in ſome caſes in power of the huſband: for though he cannot convey away, he may forfeit; as for treaſon within the ſtatute of *Edward* 3. the plaintiff's conſtruction put on the words *freehold* or *inheritance* is right; it being the meaning of the parties. There is no dower, unleſs out of inheritance; and then the word *inheritance* afterward is tautology, unleſs applied to ſome other *inheritance:* and copyholds are inheritance by the cuſtom of the realm: for though this be a nice conſtruction, yet the court often does it to attain the intent of the parties. What I chiefly lay ſtreſs upon is, that for her, *jointure* alone would do; but not on that ſingly. The words *proviſion if ſhe ſurvive*, mean the ſame as in *Vizard* v. *Longdale*, and the word *ſome* makes no difference; for it is not ſaid *ſome part*. This then was the intent, and if the declarations ſet out in the anſwer had been proved, they would have been of little weight, and a contrary conſtruction

tion would introduce a dangerous precedent in families; for there are few eſtates that have not ſome copyhold mixed; of which perhaps the owner knows not: and it would be miſchievous to let the widow claim it.

Lord Uxbridge *verſus* Staveland, *Nov.* 25, 1747. (56) Caſe 32.

THIS bill was brought by the plaintiff againſt the defendants, to diſcover whether there was an aſſignment without licence of a leaſe to him, wherein there was a covenant, that the leſſee, his executors, adminiſtrators, or aſſigns, will grind all the corn, grain, or malt, they ſhall have occaſion to uſe or ſpend, at the plaintiff's mill, according to the cuſtom; and to diſcover what corn, *&c.* has been uſed that was ground at other mills; to have a ſatisfaction for it; and that for the future it may be ground at the plaintiff's mill.

Demurrer lies to a bill for diſcovery of an aſſignment of a leaſe without licence, if it does not expreſsly wave the forfeiture.

The defendant firſt demurred to the diſcovery without licence; becauſe the plaintiff had not waved the forfeiture; citing *Eq. A.* 77.

To which it was anſwered, that the bill was not brought on the foundation of the forfeiture, or determination of the eſtate.

Lord *Chancellor* allowed the demurrer; for though the bill goes on the foundation of the defendants being aſſignees and tenants, yet there is a difference between an implied affirming them tenants, and an expreſs waving the forfeiture; for if the defendants now make the diſcovery, the plaintiff might immediately bring an action thereon: nor could the defendants come here for an injunction; which would be otherwiſe on the expreſs waiver.

It was next demurred; for that the plaintiff had not charged or averred the defendants to be aſſignees; but only that he was informed by his ſteward. But if he had, this was a collateral covenant, and not running with the eſtate; and therefore bound not aſſignees, according to *Spencer's caſe*, 5 *Co.* 16, and both the cuſtom and covenant are too extenſive and unlimited.

Theſe demurrers were alſo allowed; for the cuſtom was plainly unreaſonable, as ſet forth: if it had been a good

Collateral covenant in a leaſe not running with the land, binds not aſſigns.

(z) 2 Atk. 393.

cuſtom, it might have helped this part of the caſe, becauſe the covenant refers to it. Then within this covenant corn for the horſes, &c. of the defendants muſt be ground: and to whatever diſtance the defendants removed to live, they muſt bring it to the plaintiff's mill: ſo that this is a collateral covenant, and not to do any thing relative to the premiſſes leaſed: had it been covenanted to grind all the corn, &c. they ſhould ſpend ground, it might relate to the premiſſes; and running with the land, bind the aſſignee. The covenant, though it will bind his executors being repreſentatives, will not bind aſſigns. But ſetting all this aſide, ſuppoſing it would bind aſſigns, (a) they ought to be ſhewn to be aſſigns in a bill here, as in a declaration at law; which is not done: ſo that all poſſible objections concur againſt the relief prayed.

(57) As to the demurrer to the diſcovery of what corn, &c. had been ground at other mills; the defendants by the denial in their own anſwer have over-ruled it.

Caſe 33. Vane *verſus* Vane, *November* 25, 1747.

MORGAN VANE, a younger ſon of Lord *Barnard*, by his marriage ſettlement in 1731, recites the proviſions he was intitled to by his father's ſettlements; and among the reſt to an equal ſhare of 2000*l.* after the father's death: then there was a truſt for the benefit of the iſſue of the marriage: and a covenant by him, that all ſuch ſhare and proportion of the ſaid 2000*l.* or any other ſums provided for the portion of the younger children of Lord *Barnard*, as ſhould afterward come to him, ſhould be within the aforeſaid truſt.

The ſurplus, of the rents and profits of Lord *Barnard*'s real eſtate limited for the benefit of his children, after ſome particular proviſions, was in 1744, during Lord *Barnard*'s life, decreed to be diſtributed among his children. The preſent bill was brought againſt *Morgan Vane* by his children to have his ſhare of that ſurplus, and any that ſhould be afterward paid him by order of the court, placed out for the benefit of the plaintiff, as being compriſed within the truſt of his marriage ſettlement in 1731.

LORD

(a) Defendant may demur if Plaintiff does not ſhew ſome ground to charge him. 1 Vern. 180.

LORD CHANCELLOR.

Though this caſe is not quite free from doubt; yet on the conſtruction of the truſt, conſidered with the circumſtances of the caſe, I think the plaintiffs have no right or intereſt in the defendant's ſhare of this ſurplus. Had it been the intent to extend the truſt thereto, they would not have omitted it in the recital of the whole, *Morgan Vane* was intitled to in his father's life and afterward. It can go no farther than what was portion for younger children; and thus ſurplus cannot be conſidered as ſuch, for being for all the children, it takes in the elder alſo; and the elder, if alone ſurviving, would have the whole. Nor is it true, that the truſt would take in any other proviſion by Lord *Barnard* for *Morgan Vane*; for a legacy would not be compriſed therein.

Maddiſon *verſus* Andrew, *November* 27, 1747. Caſe 34.

ROBERT ANDREW, having a wife, two ſons, *Robert* and *John*, and three daughters *Grace*, *Anne*, and *Sarah*, by his will made 21ſt *July* 1732, deviſes his real eſtate to his eldeſt ſon; gives all his children 800*l.* portion a-piece, makes his wife executrix, and reſiduary legatee: then by a clauſe in the will gives her 600*l.* to be by her diſpoſed of to and amongſt his three daughters in (58)
ſuch proportion, and payable in ſuch manner, as ſhe ſhall think fit to give it in her life, either by will, or by any note or deed in writing ſubſcribed by her in the preſence of witneſſes, or by any other diſpoſition. The mother on her marriage of her daughter *Grace*, by verbal agreement gives her 200*l.* and afterward making her will takes notice thereof as a part and proportion of her ſhare of 600*l.* and in further purſuance of her power gives her an additional 100*l.* then gives her daughter *Anne*, who was dead, and to whom ſhe was executrix, her ſhare of 200*l.* and declaring that as her daughter *Sarah* had behaved undutifully, and married the preſent plaintiff without her conſent, ſhe would have only the remaining 100*l.* and dies, leaving her ſon *Robert* ſole executor and reſiduary legatee; who had made a voluntary ſettlement of real eſtate on his brother *John*, remainder over to his ſiſters: but he created a term of 1000 years veſted in truſtees, that he might by any

deed or act executed in his life, limit or appoint any part of the premiſes to raiſe any ſums not exceeding in the whole 4000*l.* in his life; which if not done in his life, and he ſhould die unmarried and without iſſue, he ſhould have power to charge, limit or appoint any ſums not exceeding in the whole 1000*l.* and not having charged in his life as above mentioned, and having no wife or iſſue, he makes a will, and firſt directs all his juſt debts and legacies to be paid, charging all his eſtate real and perſonal therewith: then gives a legacy of 300*l.* to the children of his ſiſter *Sarah*, to be paid by his executor, and equally divided ſhare and ſhare alike, at their reſpective ages of twenty-one or marriage, with intereſt at four *per cent.* and failing the ſhare of any, to the ſurvivors; and failing the ſhare of all, to his ſiſter *Grace*; and ſubject to all this, gives all his eſtate real and perſonal to his brother *John*.

The firſt general queſtion, and the moſt conſiderable, was as to the 600*l.* *Sarah* claiming an equal ſhare thereof by the teſtator's will; and for that purpoſe to have the mother's diſtribution ſet aſide, and the 200*l.* appointed to the deceaſed daughter *Anne* given to her.

LORD CHANCELLOR.

The power of diſtribution given to the mother is very large, though confined as to the objects; and the intent was to give her a kind of diſtreſs over the daughters. It muſt be admitted, there is a good appointment of the 300*l.* and 100*l.* and if there had been any defect in the verbal agreement, which there was not, the will made it good. The only queſtion is, on the 200*l.* appointed to the deceaſed daughter *Anne*; and which if it was to veſt, could only veſt in her executrix, who was the mother herſelf. Several queſtions have been made thereon; the firſt, if it be any queſtion, is, whether the appointment of it is good? if it is, all the other queſtions are out of the caſe: if it is not good, then the next queſtion is, whether *Anne* was intitled to any intereſt tranſmiſſible to her executrix? and if not ſo, then how the court is to direct the diſtribution; whether equally or diſcretionary as the mother might?

(59)

As to the appointment, it cannot be maintained; for the mother being limited as to the objects, could appoint it to no other. The teſtator plainly intended it perſonally to them, to keep them obedient, and had made other proviſion for them. If therefore *Anne* had left children, although it would be hard; yet the mother could not give it to them, they not being perſons within the deſcription of the power: then much leſs could ſhe give it to her executor or adminiſtrator, who might be a ſtranger to the family, and ſo contrary to the teſtator's intent: as it is in all directions of powers confined to the perſons of the objects.

Power of appointment perſonally intended to proper objects: it cannot be given to their children or repreſentatives.

Then ſecondly: Whether the mother as repreſentative, can claim this by the father's will in default of appointment; which depends on an intereſt tranſmiſſible, being veſted in *Anne*, and I think there was not ſuch an intereſt: as to the veſting or not veſting of legacies, there are ſeveral diſtinctions taken both in the *eccleſiaſtical* court, and this court, which follows the *eccleſiaſtical* court as to legacies of perſonal eſtate: (b) as where in general it is to be paid at a particular day; it is veſted, and the time of payment only poſtponed: but there is no caſe where the court has held a legacy or intereſt therein veſted, where the certainty of the ſum could not be ſaid; as here it could not at the death of the father: ſo that it was contingent and ſuſpended till the mother's execution of the power, or till it was at an end. To avoid this it is inſiſted, that this clauſe muſt be conſtrued a gift among them equally, ſubject to be diveſted, and the ſhares varied, by the appointment: but the words of the clauſe will not bear it; for it is not a gift to the daughters, but to the wife to give, *&c.* nor are there any words of equality. If it could be a bequeſt to them, it would be joint, and to ſurvive; which without more would put an end to the queſtion for *Anne*'s repreſentative. But the conſideration of the mother's power over it ſhews further, that it was contingent, not veſted: the words *ſuch proportion* vary the proportion, ſhe be-

Legacy to be paid at a future day is veſted, but not where the ſum is not certain.

Power of appointment by a mother may be unequally diſtributed, but not ſo as to be illuſory, unleſs there is a great miſbehaviour.

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(a) Ante 44. Poſt. 267. 2 Brown, 75.

(b) 1 Brown, 191, 298, where Lord Loughborough laid down the rule to be, that where the time is annexed not to the gift, but to the ſubſtance of the gift, there it lapſes by the death of the legatee. In 1 Brown, 444. a legacy towards eſtabliſhing a Biſhop in America was held not void, tho' none as yet appointed; the money was ordered to remain in Court till the appointment. 1 Brown, 103. 2 Brown 58. Poſt. 211.

ing the judge of it; (c) and if ſhe makes an inequality, the court will not enter into the motives of it, unleſs it be illuſory; as in a caſe where a mother, having ſuch a power, gave only an eleventh part to a ſtep-daughter. Yet even where but a trifle has been given to one, if that child by miſbehaviour deſerved it (though it muſt be very groſs indeed) the court will not vary it. Then it is alſo, *in ſuch manner as ſhe pleaſes*; ſo that upon an improvident match ſhe might appoint it to the ſeparate uſe of the daughter, excluſive of the huſband, which ſhews it not to be veſted; for the huſband would take any intereſt veſted in the wife. If the mother died without appointment, it would go equally amongſt them; the power being over, and it becoming
(60) certain and veſted: if all three died before the mother, the repreſentative of none would take; but it would ſink into the teſtator's eſtate; being only for the daughter's benefit. But in this caſe it ſurvives to thoſe, who were alive at the mother's death; it not being veſted ſubject to be deveſted, but contingent; and if it could veſt, it is joint, not in common.

Diſcretionary power of a parent to appoint, not being executed, does not devolve on the court.

Then thirdly, what muſt become of the 200*l.* of which the mother made no appointment, and nothing veſted at the father's death? It is inſiſted, that the mother's diſcretionary power is devolved on the court, which may appoint, as it pleaſes, and ought therefore to give the 200*l.* to the plaintiff to make an equality: but there is no ſuch devolution on the court: (d) it is true, that powers have devolved on the court by non-acting, miſbehaving, or death of truſtees: as in the appointing maintenance; it being a neceſſary thing: ſo as to a legacy given under reſtraints of marriage, to prevent which the court has acted very largely. But this is a particular kind of parental diſcretion, with which the court has nothing to do: ſo that the true conſtruction is, that ſince the mother is dead without executing the power as to this part, and there are two of the objects alive, it reſts in them equally to be divided, and there is no ground for the court to prefer one; which is conſiſtent with the conſtruction of the former point. But if this power had devolved on the court, there would be no ground to give the plaintiff a preference; whoſe behaviour has not been commendable, and gave the mother juſt

(c) In Prec. Chan. 256, it is held, That where a mother has a power to divide an eſtate among her children, ſhe muſt do it equally: 1 Co. 177. 2 Vern. 66, 355, 414. 2 Vern. 513. Caſ. temp. Talb. 73. 2 Vol. 361, 640. Cowp. 651. Brown 450.

(d) Poſt. 643, vol. 2d.

juſt cauſe of offence: although the court would not therefore exclude her entirely.

The ſecond general queſtion was, in whom the legacy of 300*l.* in the will of *Robert* the ſon ſhould veſt: whether in the only child of *Sarah* alive at the making the will; or alſo in thoſe ſince born or to be born?

LORD CHANCELLOR.

I doubted at firſt: but now think it was meant for the benefit of all the children *Sarah* ſhould have; for the teſtator, knowing ſhe had but one then, has yet given it to children, has appointed out ſurvivors: and gives it over to another branch of his family; which he could not mean, till all failed.

The third general queſtion was as to the fund for the payment of this 300*l.* legacy; perſonal aſſets not being admitted ſufficient: in aid of which, it was inſiſted, a leaſehold eſtate held of the dean and chapter of *Durham* ſhould be brought as equitable aſſets; for that though the teſtator on the renewal of the leaſe had inſerted his brother *John* the defendant's name with his own, he was only a truſtee; for the teſtator only paid the fine and rents, and received the profits. (61)

To rebut which, the defendant proved, that the teſtator put in his brother's name, as his father did his; and intended, he ſhould have the benefit of it, if he ſurvived; which though but by one witneſs, yet being uncontradicted and unimpeached, Lord *Chancellor* held, was ſufficient evidence to rebut the reſulting truſt, and in ſupport of the ſurvivorſhip, the term being in point of law veſted in them both; and all reſulting truſts being liable to be rebutted by evidence of the teſtator's intent. So that this was not part of the aſſets of *Robert* the ſon.

Then the plaintiff inſiſted that the 1000*l.* which *Robert* had power to charge on the real eſtate, ſhould be aſſets, or a charge by the will for payment of the legacy.

Lord *Chancellor* was of opinion, that it ſhould; for being a power reſerved by the abſolute owner of the eſtate making a voluntary ſettlement on his brother, it ſhould be conſtrued

Power reſerved by the owner of an eſtate to be conſtrued liberally, and no occaſion to refer to the power if it is done in ſubſtance.

conſtrued liberally, being a reſervation of part of the ownerſhip: although it is different, where the power is over the eſtate of a ſtranger; and yet ſome of thoſe have been conſtrued liberally, to the prejudice of the remainder man. Then as to his execution of it, he has uſed the word *charge*, which is the word in the power; nor is there any occaſion for his referring to the power, if he does it in ſubſtance: as in Sir *Edward Clere*'s caſe in *Coke*: and it is only a ſhadow of a difference, that he has charged all his eſtate; whereas this was before ſettled to uſes, for theſe powers to the owner are to be conſidered as part of the property: but this is moſt ſtrictly ſo; the term being in truſt for himſelf, which is the ſame as the legal eſtate; and this is ſtronger than the caſe of *Coventry* v. *Coventry*, where a power, though never executed, was held to charge the remainder man, on this ſame ground; being part of the ownerſhip.

Caſe 35. Maddox *verſus* Maddox, *December* 5, 1747.

EDWARD MADDOX ſuffered a recovery of an eſtate in *A.* deſcended to him in tail; and afterward ſettled all his lands in *A.* upon his family: a tenement in *A.* of which he had the reverſion after an eſtate for life, deſcended to him in tail by the death of the tenant for life; he ſuffers a recovery of it, and deviſes it to his younger ſon in fee, becauſe the elder had diſobliged him: he afterward mortgages it, together with 200*l.* that he had a power to charge on the ſettled eſtate, for the ſecuring 200*l.* which he borrowed; and dies.

(62) The mortgagee applies to the elder ſon for the money; who at firſt diſputed the payment; but afterward ſubmitted thereto, upon the mortgagee's aſſigning to him that tenement ſo charged, that he might ſtand in his place: to which the mortgagee agreed upon his covenanting to indemnify him for making this aſſignment; he having heard of the younger ſon's title. The eldeſt ſon mortgaged the tenement to *Belton*, who had advanced the money for the payment of the former mortgage.

The firſt queſtion was, whether the plaintiff the younger ſon, had any title to this tenement; *Belton* inſiſting that the father had no right to deviſe it, being compriſed within the ſettled eſtate?

Secondly,

Secondly, ſuppoſing he had; yet in equity there was no ground to take it away from him, who was a mortgagee for valuable conſideration without notice of that title.

LORD CHANCELLOR.

As to the firſt queſtion: the plaintiff had a title ſubject to the father's mortgage, which was only ſo far a revocation of the will as to let in the mortgagee's ſecurity. The original ſettlement was only, of what was compriſed in the recovery, which this tenement was not; the father not then having the freehold, nor intended ſo to be, as all the ſubſequent acts ſhew; *viz.* his ſuffering a recovery of it, deviſing and mortgaging it.

Then as to the ſecond; *Belton* ſays true, that he had a good right to take the conveyance from one, who was heir at law and in poſſeſſion; and having an aſſignment from the mortgagee: but it appears on all the circumſtances, that he had notice of the plaintiff's title; for which it is not material whether it was perſonal or no, notice to his agent being ſufficient. Here is ſuch evidence of general notice, either to the party himſelf, (e) or to his agent to take care, as made it neceſſary for him to inquire into the title; which he not having done, muſt take the conſequence; the mortgagee ſwearing that *Belton*'s agent was preſent at the execution of the aſſignment, when the indemnity was inſiſted upon: and the agent ſwearing that the deeds were laid before counſel, who made objections about the plaintiff's title. But if there was more doubt on the parol evidence, the aſſignment itſelf is ſtrong evidence; for it has not the face of an aſſignment to a perſon having the equity of redemption; for it is ſubject to the equity of redemption, and was plainly meant to keep the mortgage on foot, if he had not, but ſome other perſon had, the equity of redemption; as the covenant to indemnify alſo ſuppoſed.

Notice to an agent, as well as perſonal notice, will affect the party, and the depoſition of the agent will be allowed to be read.

The reading of the agent's depoſition was objected to.

Lord *Chancellor* ſaid, that though an attorney or counſel concerned for one of the parties may, if he pleaſes, demur to his being examined as a witneſs; yet if he conſents, the court will not refuſe the reading his depoſition. This objection has been often made; and though ſome particular

(e) 2 Ves. 370.

particular judges have doubted, it is now always overruled.

Caſe 36. Banks *verſus* Denſhire, *December* 9, 1747.

GEORGE DENSHIRE made his will thus: "I give all and every my freehold and copyhold meſſuages, lands, tenements and hereditaments, (having ſurrendered the copyhold part thereof to the uſe of my will) ſituate, lying and being in *L.* to *Banks*, and the heirs of his body, remainder over: and the ſaid copyhold part thereof ſhall be ſubject to the payment of 400*l.* mortgage, which is on part thereof."

The teſtator had but two copyhold eſtates in *L.* one of which he had ſurrendered to the uſe of his will; the other not.

Teſtator having a copyhold houſe, part in one manor, part in another, deviſes all his copyhold which he had ſurrendered to uſe of his will; having ſurrendered only that in one manor; that only will paſs.

The queſtion was, whether the defect of ſurrender of part of the copyhold ſhould be ſupplied againſt the ſon and heir of the teſtator? For whom it was argued, that it ſhould not, from the intent of the teſtator to deviſe nothing but what was ſurrendered: although the court will ſupply it in ſeveral caſes of younger children, if not contrary to the intent. In the caſe of the *King's Head Inn*, in *Turnham Green*, (f) which was a copyhold houſe, but three parts of it in one manor, and one in another manor; the teſtator there deviſed all his copyhold eſtate, which he had ſurrendered to the uſe of his will; having ſurrendered only that which was in the manor including the three parts: and the court held, that only ſhould paſs.

For plaintiff it was alledged, that there were ſeveral declarations by the teſtator, of his having ſurrendered all his copyhold to the uſe of his will; and therefore under a miſtake which this court will ſupply.

LORD CHANCELLOR.

That is but a parol declaration; of which I cannot take notice: but I think, there are words ſufficient to take in this copyhold eſtate; the deſcription being as large as poſſible to take in the whole; and what is to confine it, is in a parentheſis, and in nature of a recital; therefore not like words containing a deſcription. This therefore differs from

(f) Allen v. Poulton.

from the caſe cited; which was determined by me with great reluctance; the relative pronoun *which* there make it reſtrictive. Suppoſe the teſtator had begun with the recital, that "whereas he had ſurrendered *&c.*" in which he had been miſtaken; yet the words of the grant ſhould have their full effect: but the latter words ſufficiently ſhew his intent to give the whole; deſcribing it as part of what he before deviſed, and ſhewing he meant to give more than the part ſubject to the mortgage: and he had no other copyhold except that in queſtion; which therefore comes within the deſcription; and the defect of ſurrender muſt be made good.

But where teſtator deviſes all and every freehold and copyhold (having ſurrendered the copyhold part thereof to uſe of my will) he had two copyholds, one not ſurrendered; the defect notwithſtanding ſupplied.

L'Neve *verſus* L'Neve, *December* 9, 1747.

EDWARD LeNEVE in 1718 married his firſt wife, who then had a conſiderable fortune; a freehold and perſonal eſtate, with more perſonal eſtate in expectancy. His father had a leaſehold eſtate which by articles were covenanted in conſideration of the marriage, and her perſonal eſtate, to be ſettled on truſtees and their heirs for *Edward LeNeve* for life; then for his intended wife for life, for a jointure if ſhe ſurvived him: after their death, in truſt for the iſſue of the body of *Edward* by her in ſuch manner as he by deed in life, or by his will ſhould appoint: in default of ſuch iſſue, to *Edward* and his heirs. (g)

The marriage was had, and a ſettlement made in purſuance of the articles; there was iſſue; the wife died: the only children now living were the preſent plaintiffs, a ſon and a daughter. In 1743 *Edward LeNeve* married a ſecond wife; but previouſly entered into articles with her truſtees, for the ſettling this very eſtate on himſelf for life, then on her for her jointure, and on the iſſue of that marriage; purſuant to which a ſettlement was made.

This eſtate was ſubject to the *Stat* 7 *Queen Anne, cap.* 20. which requires regiſtry. The firſt marriage articles and ſettlement were never regiſtered; the ſecond were. *Edward LeNeve* alſo mortgaged this leaſehold eſtate, as abſolute owner.

The

(g) 3 Atk. 646, S. C.

The bill was brought by the children of the firſt marriage, to have an execution of the truſt of the leaſehold eſtate ſettled thereby; and in order thereto to have the ſubſequent articles and ſettlement poſtponed, though regiſtered: on the foundation of notice to the ſecond wife, or her agent or truſtee, of the firſt articles previous to her marriage, and the execution of the ſecond articles; and to have the leaſehold eſtate diſincumbered of the mortgages made in prejudice of the truſt: and that the plaintiffs may be let in according to the contingency.

Lord *Chancellor*, having taken time to conſider of the caſe, now pronounced his decree. The firſt ſettlement of this leaſehold eſtate is an odd one, for it is ſettled as a freehold eſtate: however that will not affect the queſtion, as (65) it will veſt in a proper manner. The plaintiffs admit the law to be againſt them from the defendant's regiſtering; becauſe the act gives the legal eſtate, where the regiſter has placed it: ſo that the general queſtion is, whether there is ſufficient equity for the plaintiffs to get the better of the legal eſtate veſted in the defendant's truſtee, who is a purchaſer for valuable conſideration? which will depend on the point of notice, and the conſequences of it. To determine this, ſeveral queſtions have been conſidered: firſt, whether it ſufficiently appears, that one *Norton* was agent or attorney for the ſecond wife? Secondly, whether there is ſufficient evidence in notice to him of the firſt articles; ſuch as will be admitted according to the rules of this court? Thirdly, ſuppoſing there is ſufficient evidence, whether in equity it will affect the defendant's purchaſe, and oblige the court to poſtpone the ſecond articles and ſettlement to the firſt; notwithſtanding the regiſtry act.

If on marriage ſettlement an agent is employed on both ſides, both will be affected by notice to him. Nor is it material on whoſe recommendation or advice he was employed.

The firſt queſtion will depend upon the anſwer of the defendant the ſecond wife; who in general has denied notice of the firſt articles and ſettlement; but ſays, that *Norton* was not employed for her, but as an attorney for her intended huſband; admitting that, he might prepare the articles, ſhe having a confidence in him from her huſband's recommendation. So that her general denial muſt be taken with this admiſſion; which leaves it open to the proof of notice to her agent, although perſonal notice is denied. It is ſaid, that notice to her huſband's attorney or agent will not affect her; but ſhe has ſufficiently admitted, that he was agent or attorney for her, by her conſenting to his preparing the articles, from a confidence in her huſband. So that no matter what ground ſhe went upon,

upon, or on whoſe recommendation or advice; it being the ſame to the plaintiffs: for it would be very inconvenient and miſchievous to take into conſideration the recommendation, from whence an agency aroſe; nor is it material, that the huſband alſo employed him; there being ſeveral caſes where in marriage ſettlements the ſame counſel or attorney are employed on both ſides, who would be both affected with notice to him; it being the ſame to a perſon having an equity. There are two very ſtrong caſes for this; as *Brotherton* v. *Hatt*, 2 *Ver.* 574, where the agent, whoſe notice affected the party, was employed on both ſides, as I take it, and which is very clear authority: next *Jennings* v. *Moor*, 2 *Ver.* 609, where the ſubſequent approbation of an agent affected the party with notice; though that was going much farther than is neceſſary to go in the preſent caſe. Theſe caſes clearly prove it to be not material to the plaintiffs, upon whoſe recommendation or advice *Norton* was employed, or that he was employed by both; it being good notice to her, that he was employed by her.

As to the ſecond queſtion: it is objected for the defendant, that notice being denied by her anſwer, and proved by (h) one witneſs, it is contrary to the rules of the court to admit it; which is generally true: but that admits of this diſtinction; where the defendant's anſwer is a clear denial of a fact, which is proved only by one witneſs, the court will not decree againſt the anſwer. But where it is not a poſitive denial of the ſame fact, but admits of a difference, that it is only a denial with reſpect to herſelf, whereas in other reſpects it will equally affect her, there are ſeveral caſes, where the court on one undoubted witneſs will decree againſt that anſwer: then here ſhe denies only perſonal notice: which is a negative pregnant, that ſtill there may be notice to her agent, and is a fact equally material. Then *Norton* ſwears, that a copy of the firſt article was delivered to him previous to the ſecond, to take counſel's opinion, and that he might have verbal notice before; which is very ſtrong: and the copy was delivered, to ſee, if they could get the better of this very ſettlement. So that this is ſuch an evidence of notice, as to be admitted here. (66)

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(h) 1 Vern. 161. Poſt. 97.

The laſt queſtion depends on two things: firſt, whether any notice whatſoever would be ſufficient to take away from the defendant a purchaſer for valuable conſideration, the benefit of the act? Secondly, whether notice to the agent would do ſo?

Though the regiſter act veſts the legal eſtate according to the prior regiſtry, yet is it left open to all equity:

and notice even to an agent, of a prior purchaſe not regiſtered will affect a ſubſequent purchaſe tho' regiſtered.

The firſt is of great conſequence and extent. The intent of the preamble of the act was to ſecure ſubſequent purchaſers and mortgagees, againſt prior ſecret conveyances, and fraudulent incumbrances; for the laſt of which there was no occaſion to provide. The firſt means, that a ſubſequent purchaſer having regiſtered, ſhould prevail againſt a prior ſecret conveyance, of which he had no notice: but if he had notice of a prior conveyance, for valuable conſideration, which was veſted properly, that is not a ſecret conveyance: the act does not ſay, that a ſubſequent purchaſer ſhall be affected with no equity whatſoever; therefore, though its manifeſt operation is to veſt the legal eſtate according to the prior regiſtry; yet it is left open to all equity; for there is no danger to the ſubſequent purchaſer, who might refuſe, if he had notice of the prior good conveyance. This act therefore is properly compared to 27 *H.* 8. *cap.* 16. of inrollments or bargains and ſales; being much to the ſame effect, though not in the ſame words. The meaning of this act was, becauſe before, when uſes were in being, any agreement paſſed the uſe to the bargainee from the bargainor; which occaſioned great miſchief; being prejudicial to the crown, intangling purchaſers, and overturning the common law as to the ſolemnity of livery: to prevent which it enacted inrollment. But the rule thereon ever ſince is, that an inrollment by a ſubſequent bargainee having notice of a prior bargain for valuable conſideration, whether by actual agreement to paſs immediately or by articles, is not material; for he is equally affected with that notice, as if his conveyance was by feoffment, or leaſe and releaſe. So that the operation of equity on both thoſe acts is the ſame, and is reaſonable; for it were ſtrange, that a conveyance in ſuch a form ſhould exclude any equity; which would give an opportunity to take advantage of having the legal eſtate to commit fraud: and to this purpoſe the caſes put for the plaintiffs are material. As ſuppoſe a purchaſer employs an attorney, takes a conveyance, and pays the money and orders the attorney to regiſter; which he neglects, but purchaſes it himſelf and regiſters it, that would be a ground for relief: ſo if it had not been his attorney,

torney, but one who prevailed with him not to regiſter: or if it was done by one, who was privy to the firſt tranſaction, and knew it was not regiſtered. Theſe caſes clearly ſhew, there may be relief againſt the force of thoſe words, which give a prior right to the prior regiſter: which brings it to the conſideration of the caſes on this head; which are but three. The firſt is, Lord *Forbes* v. *Denniſton*, which not being rightly underſtood, ſhall be mentioned particularly. It aroſe in *Ireland*, where was a general regiſter *Act* 6 *Queen Anne*. Lord *Granard* was ſeiſed of a large eſtate, of which he was only a tenant for life by marriage ſettlement, remainder to his firſt and every other ſon in tail, with power to make leaſes for three lives, or twenty-one years in poſſeſſion: in 1715, there were tenants, who ſurrendered and took a new leaſe from him for three lives at 30*l. per ann.* but it was not regiſtered: he becoming indebted came to an agreement with his firſt ſon Lord *Forbes*, who thereby took upon himſelf to pay his father's debts, and to pay an annuity to him, and another to his wife; in conſideration of which the father conveyed his eſtate for life to truſtees for Lord *Forbes*: but Lord *Forbes* had no perſonal tranſaction in this, the whole being done by one *Stewart*; who during the treaty had notice of a leaſe made, and got the laſt conveyance regiſtered, which the leaſe was not. The truſtees brought an ejectment to recover the eſtate from the leſſees; who brought a bill for relief in the *Chancery* there, before Lord Chancellor *Middleton*; who at firſt made a declaration, rather than a decree, that the conveyance to the truſtees was prepared to deſtroy the leaſe, which was not regiſtered; and was therefore fraudulent againſt the tenants, though done without the intention of the father or ſon; and recommended it to have the leaſe eſtabliſhed; if not, he would give judgment. The parties not agreeing, he decreed it fraudulent, *Stewart* only had notice, and decreed a perpetual injunction againſt the ejectment. Upon appeal to the Lords here, it was fully conſidered: and they made a decree 23d *February* 1722, which requires explanation; for it is commonly cited, as if the judgment were affirmed; whereas it was reverſed: not becauſe the Lord *Chancellor* there went on a wrong principle; but becauſe he made a wrong decree upon their principle; for thereby the leaſe would be good, though not warranted by the father's power. The Lords therefore reduced it to what was right; giving the tenants full relief againſt the defect of the regiſtry; quieting the poſſeſſion during the father's

father's life; and granting an injunction againſt the judgment in ejectment: but after the father's death left it open to diſpute the leaſe, if not made in purſuance of the power; for after the death of the father, who was only tenant for life, the regiſter act was out of the caſe. The ſecond is the caſe of *Blades* v. *Blades*, *May* 2, 1727, by Lord *King*; which is a very material authority. A will not being regiſtered, the heir at law gets into poſſeſſion, and mortgages to one who regiſters; and ſo having the legal eſtate, and being a purchaſer for valuable conſideration, inſiſted that the deviſee had no equity, to take from him the benefit of the regiſtry act. But the mortgage was declared fraudulent and ſet aſide, on the foot of the mortgagee's having had notice of the will's not being regiſtered; yet it does not appear in the bill or anſwers, that there was any charge of actual fraud; the only charge being notice. The third caſe happening on the regiſtry act is, *Chival* v. *Niccols & Hall*, in the *Exchequer*, *December* 10, 1725, which is a clear authority for relief againſt the regiſter act, on the circumſtance of notice: but it is not material to ſtate it, becauſe there was a charge of fraudulent circumſtances in the party claiming the benefit of the act; and therefore ſo far not applicable to the preſent caſe. The two other caſes went on notice only, and the firſt on notice to the agent; for the *Lord Chancellor* excuſed the father and ſon from notice of the contrivance. The ground, on which all the caſes went, was that taking the real eſtate after notice of a prior right for valuable conſideration was a fraud, and took away the *bona fides* of the ſecond purchaſer, making it *mala fides*; which is agreeable to the definition of fraud in the *civil law*. *Digeſt*, *lib.* 4. *tit.* 3. *et fraus nemini patrocinari debet.*

This being ſo on notice in general: the next conſideration under this head is, whether notice to the attorney or agent is ſufficient: which is a conſequence of the former deciſion. It muſt be admitted, that ſome notice would be ſufficient, as actual perſonal notice; and ſuch as in the caſes put for the plaintiff; and fraud in the party being the foundation, it is the ſame whether in the party himſelf, or the perſon employed. Theſe articles were put into *Norton*'s hands, to ſee if they could get the better of them, and circumvent the iſſue by the firſt marriage: to which it is objected for the defendant, that here may be a fraud upon her; for admitting *Norton* knew of this, it might be done by colluſion with the huſband to cheat her; which indeed

indeed may be true, and has happened in ſeveral caſes; but ought not the perſon who truſted and employed him, at whoſeſoever recommendation, to ſuffer by this fraud, rather than a ſtranger? The rule is, that he, who truſts moſt, muſt ſuffer moſt. This impoſition happened in the two caſes in *Ver.* and that of Lord *Forbes:* and yet they were affected with notice; and otherwiſe it would overturn ſeveral caſes determined on notice to agents, and make it very precarious; for agents do frequently uſe impoſition. But this caſe is ſtronger; for *Norton* was not only her agent in the tranſaction, but her truſtee; and there are ſeveral caſes, where notice to a truſtee, who is not barely nominal, being privy to the tranſaction and accepting the truſt, will affect the party: ſo it will here, and take from the defendant the benefit of the regiſter act. (69)

Then the queſtion is, what decree ſhould be made? It is objected, that the plaintiff's intereſt under the articles is merely contingent: and it is true, that without iſſue, it will go to the father, at whoſe death the will or deed appointing muſt be known. Yet the plaintiffs are intitled to come here for relief: for a contingent intereſt is ſuch, as the court will take care of, for the benefit of the party when it happens.

Decreed that *Norton* having full notice of the firſt marriage articles and ſettlement, the ſecond ſhould be poſtponed thereto; and the truſtees in the ſecond to convey and aſſign the leaſehold eſtate accordingly, at the expence of the defendant the father: but as to the other defendants the mortgagees, no notice of the firſt articles being proved on them, the plaintiffs have no right, but on redeeming them for what is due for principal, intereſt and coſts. But the plaintiffs have a clear right to have the leaſehold eſtate diſincumbered againſt theſe mortgages by the father: and as the court have in ſeveral inſtances given credit to an anſwer, ſo as to make it the foundation of an inquiry, let the maſter inquire what portion or proviſion the father gave his daughter upon her marriage; for it would be hard to direct a diſincumbrance as to her, who had already received a portion. The father to pay coſts hitherto; and had not the plaintiffs examined *Norton* as a witneſs, they ſhould have coſts againſt him.

Note, The caſe of *Irons* v. *Kidwel*, *October* 29, 1728, was cited by the *Attorney General*, where the bill was to

ſet aſide a purchaſe by the defendant, ſubſequent to the plaintiff's title, which was not regiſtered, whereas the defendant's was: and it was there inſiſted, that the regiſtry act ſhould not avail the defendant, becauſe he had notice; which notice was only that a bill was filed in *Chancery*, and that *lis pendens* ſhould affect the defendant: but Lord *King*, though he allowed the general rule of notice, thought it not ſuch a notice as ſhould take away the defendant's benefit of the ſtatute; for that what did affect the party's conſcience, would not be a ground for equity to relieve.

(70)

Caſe 38. Sperling *verſus* Toll, *December* 11, 1747.

At the *Rolls*, Sir *William Forteſcue*.

An executory truſt by will to three perſons for their reſpective lives as tenants in common not as joint-tenants, but if any died without iſſue living at their death, that part to go to ſurvivors with contingent remainders to 1ſt, &c. ſon of their reſpective bodies, in default of ſuch iſſue, over; 2 die in life of teſtator, the 3d leaves a ſon, he ſhall only have his father's ſhare, the other two go over.

DOROTHY CARD, having a power under the will of her huſband to diſpoſe of a real eſtate, in purſuance thereof deviſed it with the reſidue of her perſonal eſtate to truſtees to turn it all into money, then to lay it out in the purchaſe of land; one moiety thereof to the uſe of her brother *William* for life: then ſubject to an annuity of 50*l.* to his wife; to his three ſons during their reſpective lives, without impeachment of waſte, as tenants in common and not as joint-tenants; but ſo that if any of theſe three ſhall die without iſſue living at the time of their death, that part or ſhare ſhall go to the ſurvivors; with power to leaſe and make a jointure: then to truſtees to preſerve the contingent eſtates during their lives; which were, after their reſpective deaths, to the uſe of their firſt and every other ſon of their reſpective bodies lawfully begotten, ſeverally and ſucceſſively in remainder, according to priority; and in default of ſuch iſſue, to the uſe of the daughters; in default of them, to the uſe of 10 grandchildren of her huſband's ſiſter, their heirs and aſſigns, equally to be divided ſhare and ſhare alike, as tenants in common, not as joint-tenants.

Two of the nephews of the teſtatrix, and alſo three of ten deviſees over, died in the life of the teſtatrix: the ſurviving nephew left a ſon.

For that ſon it was inſiſted, that he ſhould take the whole three parts of the nephews as tenant in tail; this not

not being a deviſe of a mere legal eſtate in land, but an executory truſt, and like the caſe of money articled to be laid out in land; on which the court will put a different conſtruction, and take larger ſtrides to attain the intent, than on a deviſe of land: which intent here was, that nothing ſhould go to the deviſees over till a failure of iſſue of all the nephews.

Againſt this it was ſaid, that the ſon ſhould take only one third, his father's ſhare; and that the other two ſhares ſhould go over. This is not a mere deviſe of perſonal eſtate; the queſtion depends on this, whether croſs remainders are limited by this will; and if not, whether the court will direct the ſettlement, as if they were. They certainly are not ſo limited: and although where there are only two objects, croſs remainders may ariſe by intent and implication: yet it is not ſo, where there are three or more, notwithſtanding the plaineſt intent; from the inconvenience that would follow. *Gilbert* v. *Witty*, *Cr. J.* 655. (71)

Maſter of the Rolls.

This muſt certainly be taken as real eſtate; the fund itſelf coming out of a real eſtate directed to be ſold. It is a general rule, even in the diſpoſition of real eſtate, that there is a great difference, where it is executory and where immediate; there being ſeveral caſes, where the court has taken a greater latitude in the execution of the former: where it is executory, the court will often direct it in ſtrict ſettlement, where the party would have taken an eſtate-tail, if it had been an immediate deviſe; this is undoubtedly executory. It is ſaid, the intent was, that while there was iſſue of the three nephews, it ſhould not go over; and that being executory, it ſhould be ſo directed. The court will always go as far as poſſible to ſupport the intent, but that intent muſt appear from the words of the will. There are few caſes, where evidence of the intent will be allowed out of the words: it only will where there is a doubt to whom the reſidue is given, or for aſcertaining the nature of the legacy or perſon of the legatee. If then the court is ſo very cautious, where there is evidence to prove the intent, much more ought it to be ſo, where that evidence ariſes only from the ſurmiſe of counſel or of the party: the court is to carry the will into execution; not to make one for the party, or to give that conſtruction which the court ſhould think moſt proper. If this matter was laid before the teſtatrix, ſhe might think it reaſonable, that it ſhould not go

over, while there was iſſue; and it might be very proper: but that does not appear from the words; rather the contrary. The plain conſtruction carries it after the death of each reſpectively; and not to give a ſurvivorſhip on the death of one without iſſue; for it is given in common, and ſurvivorſhip was in the contemplation of the teſtatrix, as appears from her directing a ſurvivorſhip for life; and having omitted it in the direction of the inheritance, it is reaſonable to ſuppoſe, ſhe did not intend it. There is no occaſion therefore to have recourſe to the caſe cited, that the court will not give croſs remainders by implication; becauſe it does not appear from the words of the will. So that only one third goes to the ſon, the other two to the remainders over, there being no iſſue female.

Another queſtion was made: whether the ſhares of the three deviſees over, who died in the life of the teſtatrix, were ſo veſted as to be tranſmiſſible to their repreſentatives, or ſhould lapſe?

Maſter of the Rolls ſaid, it was hardly to be called a queſtion; for it certainly was not tranſmiſſible. It muſt be looked upon in the nature of land, and though it was perſonal eſtate, it would lapſe; being given in common: had
(72) it been given jointly it would ſurvive.

Caſe 39. Attorney General *verſus* Smart, *March* 4, 1747-8.

AN information was brought to have the increaſing ſurplus profits of a charity ſchool, founded by the crown, applied for the benefit of the maſter; but the maſter was not a party thereto. There was a croſs bill to have them applied for the benefit of the poor children.

LORD CHANCELLOR.

The rule that an information for a charity is not to be diſmiſſed, but there muſt be a decree not where

It is very unfortunate, that theſe cauſes, called charity-cauſes, are more often reduced to the ſingle queſtion of coſts than any other. This is a very cauſeleſs information, and ſhould be diſmiſſed without any decree, if it was not for the croſs bill. (i) The doctrine is true in general, that where there is an information, it ought not to be diſmiſſed, but for the eſtabliſhment of the charity, holds only in caſes of private charities, founded by the crown.

(i) Where no charter, information for a charity not to be diſmiſſed though the relief prayed fails, *ſecus* where a charter. 2 Ves. 328. Ante 43.

but there ſhould be a decree to eſtabliſh the charity according to the intent of the donor: but that rule relates to private charities; for where there is a foundation for a perpetual charity by the crown, it is eſtabliſhed as well as it can be already, by a higher authority than this court. This is a foundation by the crown; and there is a particular direction by the laſt charter, for the application of the revenue: nor will I make a decree for the eſtabliſhment of a charity, which is properly regulated by charter from the crown. The information is plainly brought for the benefit of the maſter; and had it ſtood on that only, it muſt have been diſmiſſed, or ordered to ſtand over to make him a party. According to the caſe of *Thetford School*, 8 *Co.* 136, if the whole revenue had been applied for the maſter, it might be a ground to apply the increaſing ſurplus, in the ſame manner, agreeable to the intent; but there has been great alteration here: as a doubt whether the whole body was not diſſolved for not taking the oaths, and ſo a new charter granted by the crown (who had a right to viſit) and accepted by the corporation, appointing a very ample ſalary to the maſter; in contradiction to which, this information would exhauſt the whole for the maſter's benefit, and take it from the poor boys. This then being an unneceſſary information, and in contradiction to the right, (k) the relators muſt pay the coſts thereof. Nothing ſhould be more diſcouraged than the bringing informations colourably for the benefit of a charity, but contrary to the real charity.

(73)

Stephens *verſus* Trueman, *March* 5, 1747-8. Caſe 40.

A Woman intitled to 500*l.* (l) if ſhe ſurvived her father, and to a moiety of a real eſtate; (m) the other moiety belonging to her ſiſter, after whoſe death it might come to her (both coming on the part of her mother) going to marry a huſband who could make no proviſion for her; the father agrees thereto, and in conſideration of natural love and affection, agrees to give her this 500*l.* in preſent for

On marriage of a daughter there is an agreement that the father ſhall in preſent pay for her ſeparate uſe real eſtate, marriage to perform-

500*l.* to which ſhe was not intitled unleſs ſhe ſurvived him: and that a which came to her from her mother, ſhould be ſettled after the uſes of the the father and his heirs; the right heir of the father intitled to a ſpecific ance of theſe articles.

(k) On this account there muſt be always a relator, therefore, if they all die or there is but one, and he dies, a new relator muſt be inſerted, before there can be any further proceedings. Ch. Pleas, 42, 2 Veſ. 330.

(l) 3 Atk. 186. (m) Wils. 356.

for her ſeparate uſe: the other part of the agreement was, that the real eſtate of the daughter, whether in poſſeſſion, or ſuch as ſhould any way come during the coverture, ſhould be ſettled to uſes, *viz.* to herſelf for life; then to all her iſſue by that or any other huſband; then to her ſiſter and her iſſue; then to the father and his heirs.

This bill was brought by the heir of the father, for a ſpecific performance of the agreement: and for the plaintiff were cited the caſes of *Oſgood* v. *Strode*, 2 *Wm.* 245, and *Vernon* v. *Vernon*, 2 *Wm.* 595, and 245, and *(n)* and *Fagg* v. *Naſh*, *October* 22, 1744, where Sir *Robert Fagg* was ſeiſed of an eſtate in fee, and on the marriage of a ſon, they covenanted to ſettle it to the uſes of the marriage, remainder to the third daughter of Sir *Robert*, who, on the determination of the precedent eſtates, brought a bill for performance againſt the heirs at law; and the queſtion was, whether a court of equity would ſettle it upon her, who was a mere volunteer? Your lordſhip there held, that every party had a right to have it carried into execution; from which a volunteer ſhould not be cut off. The ſame reaſon holds for carrying into execution, a ſettlement on a child by a father; the court extending its power in caſes of agreement to things not in fee: the haſtening the payment of the 500 *l.* was a conſideration, and the court does not weigh conſiderations of this kind to ſee whether they are adequate or not.

For defendant. It was ſettled in *Furſacre* v. *Robinſon* 475, *Chan. Prec.* that the court will not compel a ſpecific performance of a voluntary conveyance. No decree has been made on the foundation of a voluntary intereſt; none of the caſes cited went on the ground of diſputing that rule, which governed a court of equity, but that the caſes were not within the rule, and it would be unreaſonable to carry it to the plaintiff, who is a relation of the half blood to the daughter.

LORD CHANCELLOR,

(74) When the rules of the court and the nature and intent of theſe articles are conſidered, this is a ſtrong caſe for the plaintiff, that a conveyance ſhould be to the plaintiff in fee as right heir of the father. The old rule was, and is now generally (although of late not ſo ſtrictly adhered to) that none can come here for a ſpecific performance, who

(n) Reported in 3 Atk. 186, by the name of Goring and Naſh.

who does not come under the conſideration of the agreement; as that it ſhall not be for the benefit of collateral branches in marriage articles: but as agreements are entire, and the ſeveral branches might have been in view, the court has in latter caſes laid hold of any circumſtances to diſtinguiſh them out of it, ſtill preſerving the rule in general. If therefore there was any kind of conſideration, the court would lay hold of it to ſupport it, as in *Oſgood* v. *Strode*: there the limitation to the iſſue of the marriage was expired; but becauſe the father had ſome intereſt in the eſtate ſettled, part moving from him, and it might be preſumed, that he ſtipulated for the collateral branches, they were held within the conſideration. The court has got out of it in another way, as in *Vernon* v. *Vernon*, becauſe an action might be brought in the name of the truſtees; though there clearly the perſons claiming were not within the conſideration. Then to conſider the nature of the preſent caſe; the father muſt be taken, not to be obliged to pay that 500 *l.* in which the daughter had only a contingency; ſo that if ſhe died in the life of the father, her repreſentative would not be intitled thereto: then the father's paying it was a conſideration for any benefit, the daughter might give him in the articles. The intent of the wife, as well as the other parties was to ſettle, whatever ſhe might be intitled to, out of the power of her huſband; which would give her great power over her property, and over him; ſo that ſhe ſhould not oblige her to ſettle it as he pleaſed: and for the precarious and remote intereſt limited to the father, the advancing 500 *l.* by him was a ſufficient conſideration, although not mentioned for a conſideration, but natural love and affection only; for the whole muſt be taken entire, and one part to influence the other. This therefore is to be diſtinguiſhed from all the caſes, where it was voluntary; nor was it unreaſonable to limit it to the father, rather than the collateral relations of the mother, who were more remote than the heirs on the part of the father; to whom it might be intended to go; and to whom it would be very difficult to have the reverſion go by limiting it in any other manner than to the father and his heirs, which was the true way. Then to conſider this on the reaſon of *Vernon* v. *Vernon*, an action would lie here in the name of the truſtees, with whom the daughter covenanted for herſelf and her heirs, againſt the mother, if I ſhould not decree a ſpecific performance; which I believe, I alſo mentioned as an ingredient in the caſe of *Fagg* v. *Naſh*, where an action might be brought. The deſcription here intended to take in

the

the whole, ſo that there muſt be a conveyance to the plaintiff in fee.

But no coſts; for the defendant being a diſinherited heir, might well have the opinion of the court.

(75)

Caſe 41. Corporation of Clergymens Sons *verſus* Swainſon, *March* 5, 1747-8.

Payment of intereſt for a legacy by an executor from time to time ſhall be evidence of aſſets, not ſo of a ſingle inſtance of payment of intereſt.

DOctor *Grandorge* by his will gave 500*l.* to the corporation, to be by them applied for the benefit of the daughters of the poor *clergy*, as they ſhall think fit: but by a codicil directs that 500*l.* be placed out by his executors immediately after his deceaſe, in government or land ſecurities at intereſt, to be paid to five poor old women for twenty-one years, if they or any of them ſo long lived, making *A.* and *B.* his executors; who exhibit no inventory or account, but pay the intereſt during their lives; and the huſband of *B.* after her death, continues to pay her proportion.

Both executors being dead, the plaintiffs brought a bill, as legatees following aſſets for payment, and inſiſted that a minute account ſhould not now be taken; but that the acts of the executors were as ſufficient evidence of aſſets come to their hands, as a formal admiſſion would be.

For defendants it was inſiſted, that the repreſentative of *B.* and not of her huſband, ſhould be brought before the court to be charged: and that, though the court has followed the aſſets into the hands of ſtrangers for legatees or creditors; yet the court has not taken it to be an entire admiſſion of aſſets, but only for ſo much.

LORD CHANCELLOR,

This is a particular caſe, and ſuch as it is incumbent on the court to aſſiſt the plaintiffs if poſſible; and not put them to the taking a ſtrict account of the aſſets of the teſtator, as there cannot now be a perſonal examination of the executors. By the alteration of the codicil, the corporation had no right to demand this legacy till after the death of the five perſons or twenty-one years: the queſtion is as to the fund, out of which it ſhall come. The court has often gone upon this, that after length of time the acts of an executor ſhall be conſidered as evidence of aſſets come to his

his hands; eſpecially if intereſt has been paid from time to time: for the executor muſt be preſumed to know what he did, although a ſingle inſtance of payment of intereſt for a legacy by an executor will never be conſidered as a proof of aſſets. What other ground could there be for continuing theſe payments, if the principal had not come to their hand? There is no one having a right to the effects of *B.* but her huſband who ſurvived her: his repreſentative therefore is ſufficient without requiring the repreſentative of the wife to be brought before the court; ſhould I order that, they muſt go into the eccleſiaſtical court, and to what end? It not appearing that the wife had any ſeparate eſtate. As to what is ſaid of an admiſſion only for ſo much; this is the caſe of a huſband, who poſſeſſing all the aſſets of his wife, might have applied them for his own uſe; and a *devaſtavit* would have lain for a waſting by him or his wife. He had the whole power over the aſſets, whilſt her right to the adminiſtration continued, and it is admitted, that he continued the payment of the intereſt after her death. There is a ſufficient evidence then of aſſets come to the hands of the executors, to anſwer the legacy between them. Let the queſtion of the proportion be between themſelves; nor ſhall they put theſe poor people to a minute account after this length of time, and after ſuch acts by them, and no inventory taken. Nothing is more neceſſary than to keep executors to deliver inventories. (76)

Pole *verſus* Pole, March 8, 1747-8. Caſe 42.

A Father upon his ſon's marriage gives him a conſiderable advancement; and having ſeveral younger children beſides who had no proviſion he ſells an eſtate; but 500*l.* only of the purchaſe money being paid, he took ſecurity for the remainder in the name of himſelf and his ſon. The father received the intereſt and great part of the principal without any oppoſition from the ſon; as did his executrix after his death; the ſon writing receipts for the intereſt.

A queſtion was now made, whether the ſon ſhould be conſidered as truſtee for the father, or intereſted in his own right?

LORD

LORD CHANCELLOR.

(o) No doubt where a father takes an eſtate in the name of his ſon, it is to be conſidered as an advancement, but that is liable to be rebutted by ſubſequent acts: * ſo if the eſtate be taken jointly, ſo as the ſon may be intitled by ſurvivorſhip; that is weaker than the former caſe, and ſtill depends on the circumſtances. The ſon knew here, that his name was uſed in the mortgage deed, and muſt have known, whether it was for his own intereſt, or only as truſtee for the father, and inſtead of making any claim, his acts are very ſtrong evidence of the latter: nor is there any colour why the father ſhould make him any farther advancement, when he had ſo many children unprovided for; and in uſing the ſon's name, the father might have a view that the ſon ſhould be a truſtee rather than another.

(77)

Caſe 43. Hill *verſus* Ballard, *March* 9, 1747-8.

Bond by a father on marriage of his ſon, given to the ſiſter for money advanced by her to her brother: the ſon pays the intereſt during father's life, and a month afterward: this is notwithſtanding an advancement for the ſon, and a debt on the father's eſtate, not to be indemnified by the ſon; but it would be otherwiſe, between ſtrangers.

A Son applied to his father to advance him a ſum of money upon his marriage, to enable him to make a preſent to his wife; which the father refuſed; but put it into the method of the ſiſter's advancing the money to her brother; the father giving an obligation as a collateral ſecurity.

The father's eſtate thereby becoming liable, the queſtion now was, whether he meant only to be a ſurety for his ſon, and conſequently to be indemnified, as it was argued, he ſhould; the ſon having paid the intereſt during the father's life, and a month afterward; which was ſaid to be ſtrong evidence of the ſon's debt, not the father's?

The reading the father's papers, books, and memorandums, was objected to. But Lord *Chancellor* allowed it; queſtions of this kind, whether the advancing or paying a ſum

(o) Even in the name of the ſon and a truſtee is held an advancement; 1 Wms. III. 1 Atk. 480.

* 1 Chan. Caſ. 27, but in 2 Atk. 480 lord Hardwicke ſaid this was no advancement, for till a diviſion the father had the whole, and afterwards a moiety, beſides the chance of ſurvivorſhip.

a ſum of money by a father was intended as a bounty to a child, being hardly to be cleared up any other way; and there are ſeveral caſes, where evidence may be read againſt one defendant, ſuch as an admiſſion in his anſwer, which in all its conſequences, if taken to be true throughout, would affect another defendant; and therefore the court would take it to be true only in part.

The evidence being read, Lord *Chancellor* ſaid, though it was not abſolutely clear, he thought, there was enough to make a determination upon. It was clearly proved that the obligation was given for a ſum of money advanced by the ſiſter to her brother; but it importing only a ſurety, if the caſe was between ſtrangers, the father would be indemnified. But the material part of the caſe is, that this is between a father and a ſon: had the father, inſtead of advancing money, taken ſecurity from the ſon, to make him debtor for it, it would be a fraud upon the marriage; which this court always diſcountenances; like the caſe where ſecurity is given by the ſon to refund part of the portion to the father: between ſtrangers alſo the ſon's paying the intereſt would be evidence of his debt; but the father's intent was not to take any part of the burthen during his life, therefore the ſon undertook to pay it during the father's life; ſo that it was intended as part of the neceſſary advancement of the ſon on his marriage: therefore to be conſidered as a debt on the father's eſtate.

But no coſts were decreed againſt his repreſentative; it not being unreaſonable to have the opinion of the court, upon ſuch a dark account. (78)

Attorney General *verſus* Talbot, *March* 21, 1747-8. Caſe 44.

THE foundreſs of *Clare Hall College* in *Cambridge* appointed the Chancellor to viſit: *et ſi quid reperet corrigendum*, to amend it: and to determine doubts, and conſtrue the ſtatutes; excluding her heir therefrom.

Information that the relators ſhould be admitted fellows of a college; it not being for eſtabliſhment of a charity it would take away the juriſdiction of the common law: they ſhould bring a *mandamus*.

By the will of one *Freeman*, 2000*l.* was directed to be laid out in lands, for the relief of 10 poor ſcholars, two of whom to be fellows of *Clare Hall*. The executors being truſtees of the legacy agree with the college for it; and

(p) Poſt. 464. 3 Atk. 662,

and follow the will of the donor as to the qualifications, which ought to be obſerved.

Information lies not here, as on a general charity, to call colleges to account as to election of members or application of the profits.

The information praying that the relators ſhould be admitted fellows; the defendant put in a plea thereto: and the general queſtion was, whether by this plea it was ſufficiently ſhewn to the court, that there is a general viſitor? which had two ſubordinate queſtions. Whether here is a general viſitor of the college? And whether that general viſitor extends to the private foundation by *Freeman*?

LORD CHANCELLOR.

I have received ſatisfaction enough to determine on this plea at preſent; becauſe it will not be final on the merits; and certainly as it is of the firſt impreſſion, it is of great conſequence. If a determination ſhould be made, that colleges ſhould be ſtill liable to an account with regard to the election of members, or application or miſapplication of profits; it would open a door to a great deal more of vexation. This is the firſt caſe of the kind I have known.

No particular form of words to make a viſitor.

As to the firſt queſtion: upon what is ſet forth, I think, there is a general viſitor on the old foundation. Inſtead of the general words creating a viſitor, the founder has ſplit them too much, in directing what to do; which is the occaſion of moſt of the queſtions in colleges about viſitors (q). There is no particular form of words requiſite to make a viſitor; but it muſt be conſtrued on the whole from the intent of the founder: but here it is to *viſit*; to which it is conſequential, that he ſhall have power to receive appeals, and all other acts of viſitorial power, and in the general creation of it extends to all kind of rights, from the words *ſi quid, &c.* and the viſitor might amove a fellow, and let in another having a right; which as he might do on the annual viſitation, he might do on appeal: and the excluding the heir ſhews a ſtrong intent, that ſhe ſhould be a general viſitor, not to a particular purpoſe. Therefore on the ſeveral ſtatutes ſet forth in the plea taken together, the Chancellor is viſitor. The powers are abſolute and final; and cannot be taken away by the courts of law in this kingdom. Such alſo is the intent; and notwithſtanding what has been ſaid, it is the moſt convenient juriſdiction; for though perhaps it may be ſometimes abſurd, yet it is leſs expenſive than a ſuit in law or equity; and in general has been exerciſed in a reaſonable manner.

(79)

As

(q) 2 Ves. 328, 2 Wms. 325.

As to the ſecond queſtion, I think it does extend to the two fellowſhips founded by *Freeman*. It is ſaid there is nothing in the will expreſſing or implying, that they ſhould be part of the ancient body: but I think otherwiſe from the words in the will, that it meant two fellows, according to the nature of that foundation and inſtitution. It is truly ſaid to be a queſtion of great conſequence; for if it ſhould be allowed, that theſe original grafted fellows ſhould not be under the ſame powers, it would create great confuſion. It is ſaid, that this being a corporation could not extend itſelf, and that therefore this agreement cannot make them part of the college; but I muſt take them as members: had the number been limited, they could not have added thereto; but here it was indefinite, and the corporation might add in a reaſonable manner; and they will be ſubject to the ſame powers. And though the agreement be a private contract with the truſtees, it is ſuch an act of the college, as the viſitor had a right to take notice of: ſo that as to the queſtion, whether the college did right in refuſing the relators, the viſitor is a more proper judge than a court of law or equity; becauſe he can better enter into their qualifications. It will be open to the relators, who may counterplead the facts ſet forth in the plea: but I muſt take it to be otherwiſe now from the prayer of the information; againſt which I alſo hold, as it prays an account; for the college may have innocently erred in conſtruing the ſtatutes. But why do the plaintiffs come here? why not bring a *mandamus*? the information, not being for the eſtabliſhment of a charity, would take away the juriſdiction of common law: and though it is ſaid, *boni judicis eſt ampliare juriſdictionem*, yet I am againſt enlarging the juriſdiction of this court to caſes ariſing in colleges on this foundation; which would cauſe more controverſy.

New ingrafted fellows of a college ſubject to the viſitor's juriſdiction and the ſame powers as the old foundation.

The plea ſhall be allowed: it being ſtill open at the hearing the cauſe.

(80)

Attorney General *verſus* Wyeliffe, *Jan.* 26, 1747-8. Caſe 45.

ON the foundation of a charity ſchool the wardens of were by the ſtatutes to nominate a maſter within 60 days after an avoidance: upon their default the dean and chapter of *York* within 30 days were to do it: then it devolved to the biſhop.

Nomination of a maſter to a charity ſchool, not like the preſentation to a living.

The

The wardens nominated the defendant *Romney*; who not being then in prieſt's orders, as the ſtatute required, the biſhop taking it to be a lapſe, ſent notice of the chapter; who not making the nomination, the biſhop after the expiration of the thirty days nominated Mr. *Craddock*, who afterwards made a reſignation of his office into the hands of the wardens of the ſchool, and every other perſon having power and intereſt to accept it. They in five days afterward again nominated *Romney*, then being in prieſt's orders.

To which nomination, ſeveral objections were taken on the part of the relators.

LORD CHANCELLOR.

In theſe caſes where no perſon has made out a title, the court having a power to regulate charities, often gives direction to proceed to a new election, according to the ſtatutes. It depends here upon the right of the defendant *Romney*, which if good, is an anſwer to the relief prayed; and I am of opinion, that on the laſt nomination he has a good title to be maſter.

The only objection to his firſt nomination, the not being in prieſt's orders, though but a ſlight objection at this time, yet on the conſtruction of the ſtatutes cannot be diſpenſed with by the court. I ſhould doubt indeed, whether to be in prieſt's orders ſhould be ſtrictly taken according to the canon law, or agreeable to common parlance; if it turned to that alone: but the ſubſequent ſtatutes ſhew, that ſuch orders were meant, as capacitated the perſon to celebrate maſs; which is a deciſive conſtruction on the words of the former ſtatute, and binds me down; for ſince the reformation a charitable foundation for ſaying maſs, or praying for the ſouls, *&c.* is adjudged to be performed by ſaying the ſervice according to the liturgy. 1 *Inſtit.* 95. *b.*

But the ſecond nomination is valid. The firſt objection thereto is, that the wardens could not nominate him this ſecond time, as upon the firſt avoidance, becauſe the ſixty days given by the founder were expired, and there was a devolution to the biſhop: to which it was anſwered, that this is like a lapſe; of which if the biſhop does not take advantage, he is bound to accept of the preſentation of the patron; though not ſo in the caſe of the crown. But I think this not like a lapſe; for a perſon in the ſecond inſtance

ſtance is as much a patron for that time as in the firſt: therefore not within the reaſon of a lapſe; which is that the cure of ſouls may not be neglected.

The ſecond objection is, whether it is good on the reſignation of *Craddock*; and I think it is.

An objection to the wardens right to preſent, is taken from the want of ſufficient notice to the chapter; though I think the biſhop was miſled in the giving notice, and ſhould, if properly adviſed, have gone further, and ſent them alſo a copy of the ſtatutes: yet he was not ſtrictly bound thereto in point of law; for he was to preſume, that they knew of the ſtatutes as well as he. Notice is to be given of the facts; but not of the foundation of right, which they were to inquire into: as upon notice of an avoidance, the patron is to look into all the conſequences of it.

The next objection is, that the biſhop's turn was never really ſerved: and this has been compared to the caſe of a preſentation to a living and to a lapſe, that where the preſentee of the king dies before induction, or the preſentee of a common perſon before inſtitution, they ſhall preſent again; which is true, becauſe it is by the ſame original act: but the analogy of thoſe caſes, is not to be carried to caſes where there are not the like requiſites: and *Craddock*'s being in actual poſſeſſion is not material; for he might maintain an ejectment for the lands, if any, and recover them; which ſhews he was maſter.

Objected, that he was not maſter, becauſe he had not taken the oath: but the ſtatutes import, that he was firſt to take the office, being only directory, and not a condition precedent as to the oath. The remedy for his not taking it is, that the wardens may turn him out: nor is it in this reſpect to be compared to the officers of corporations; all the charters being different from this. Then the reſigning is ſtrong evidence of his accepting the office. The proceeding to a new nomination was regular, and within ſixty days; and what weighs with me is, that the reſignation was to quiet the matter; and for this further reaſon it is not like a preſentation, becauſe the biſhop could not revoke it; which the king before induction, or a common perſon before inſtitution might do.

The

The relator then having made no right, which the defendant has, and no objection to his character; it muſt be diſmiſſed with coſts.

(82)

Caſe 46. Owen *verſus* Davies, *February* 1, 1747-8.

Specific performance of an agreement decreed againſt one ſince become a lunatic.

THE bill was for a ſpecific performance of an agreement with one, ſince become a lunatic, for the ſale of a reverſion upon an eſtate for life.

LORD CHANCELLOR.

From the opening the cauſe I doubted, whether under the circumſtances attending the defendant I ſhould decree a performance; but upon the equitable circumſtances of the caſe I muſt. It is certain, that the change of the condition of a perſon entering into an agreement, by becoming lunatic, will not alter the right of the parties; which will be the ſame as before, provided they can come at the remedy. As if the legal eſtate is veſted in truſtees, a court of equity ought to decree a performance; and the act of God ſhould not change the right of the parties: but if the legal eſtate be veſted in the lunatic himſelf, that may prevent the remedy in equity, and leave it at law.

Another part of the caſe, which made me doubt, was, the manner agreed on among themſelves for the diſpoſal of the purchaſe money; which I ſhall not eſtabliſh, but ſhall decree the money to be taken care of for the benefit of the lunatic. But on the firſt part there is no imputation by any of the defendants as to the value of the contract and the conſideration; which is agreed to be reaſonable, and delivers the court from a great difficulty. The queſtion then ariſes, upon what terms it is to be performed; whether intereſt is to be paid, and from what time?

Generally on an agreement for purchaſe of an eſtate in poſſeſſion, the court never gives intereſt for the purchaſe money, but from the time of the purchaſer's coming into poſſeſſion, where he takes poſſeſſion before the conveyance is executed, and has the profits: but here he has not the profits, only the reverſion. It is true, it is hard to ſay the reverſion ſhall be ſold ſeveral years after, and ſo much

near

nearer poſſeſſion, for the ſame price, without any compenſation when the plaintiff had an abſolute title in equity to the eſtate, and a right to call on the truſtees for a conveyance: but that will depend on the ſubſequent agreement of the parties by an inſtrument in writing, which appears to be reaſonable, that the reſidue of the purchaſe money, above what was already paid, ſhould bear intereſt at four *per Cent.* but the inſtrument not being ſigned by the plaintiff or his agent, though ſigned by the other parties, it is argued, that he is not bound thereby; but I think he is. There are ſeveral agreements binding the parties in this court, though not ſigned by them; (r) as where any thing in particular has been done thereon: here part of the purchaſe money has been paid: it is the agreement of all, though ſigned only by ſome, and the plaintiff made no objection to this inſtrument before the bill, nor particularly by the bill: then ſeveral receipts having been given for part of the purchaſe-money; if the agent for the lunatick has accepted of the money in part of the principal, when intereſt was due, without applying it in diſcharge of the intereſt, the court muſt do it for him.

Agreement not ſigned by one party, where binding.

(83)

If therefore the plaintiff will have a ſpecifick performance, it muſt be on ſuch a proper application of the money, and payment of intereſt from the time of that inſtrument. No coſts on either ſide.

Hill *verſus* Allen, *February* 3, 1747-8.

Caſe 47.

THE bill was by an apprentice, who againſt his maſter's conſent had quitted his ſervice of a ſhipwright, before his time was out, and gone on board a privateer, which took a very conſiderable prize; whoſe ſhare thereof the maſter claimed.

The court will not relieve againſt a maſter's legal right to all the earnings of his apprentice who quitted his ſervice before his time.

LORD CHANCELLOR,

In general the maſter is intitled to all that the apprentice ſhall earn; conſequently if he runs away and goes to a different buſineſs, the maſter is intitled at law to all

(r) The court conſiders an agreement partly executed out of the ſtatute of frauds, being fraudulent in one party to contract and lead the other on, and then withdraw from the performance. 1 Brown 417. Prec. Ch. 519. Supra, 297, 441. 1 Atk. 12. 3 Atk. 4. 1 Vern. 151, 473. 2 Vern. 455.

his earnings: yet if a caſe comes before me in equity, where the maſter, inſtead of inſtructing him in the particular buſineſs his parents intended, encouraged and ſeduced him to go to ſea; and to a different courſe of life, I ſhould incline to relieve the apprentice againſt the maſter's legal right; otherwiſe it would deſtroy the faith of the contract between the parents and the maſter; but that is not the preſent caſe; for it appears, that the maſter took all reaſonable methods to prevent this; and is clear of any imputation. Indeed that roving diſpoſition in the apprentice, were it not in contradiction to his contract with the maſter, is not to be blamed; being in ſome ſort uſeful to the public. Then as to the bond, given by the boy's mother, with 30*l.* penalty to indemnify him for any loſs he ſhould ſuſtain by his quitting his ſervice; if it appeared to be a ſtated agreement for damages, it might be another point: but at the time of giving the bond they were told all his prize money would belong to his maſter; ſo there is nothing in equity to relieve. I will ſend it to be tried therefore in an action at law, as I did in another caſe, unleſs they compound it; but, I think, the balance ſhould be in the boy's favour.

Meriton *ver.* Hornſby, Ante 48.

(84) The ſhare being 1200*l.* the maſter accepted 450*l.*

No coſts as between them; but the coſts of the managers to be deducted out of the plaintiff's ſhare.

Caſe 48. Davies *verſus* Baily, *February* 8, 1747-8.

Where in a will a wife not included in the words relations according to ſtatute of diſtribution.

THE teſtator, having made an abſolute bequeſt to his wife of a watch and other things given her by any of her relations, and the uſe of the family pictures for life, gives all the reſt and reſidue of his perſonal eſtate to truſtees, to place it at intereſt, and permit the wife to receive the intereſt to her uſe during her natural life, and after her deceaſe then the ſaid reſidue, and all ſecurities thereof, to ſuch of his relations as would be intitled thereto by the laws in force of diſtribution, to be divided as the ſaid laws direct. By another clauſe he directed, that whoever commenced a ſuit againſt the wife or truſtees during her life, ſhould have no part of the real or perſonal eſtate; but that their part ſhould go among ſuch other of his relations, as the ſtatute of diſtribution ſhould appoint, to be equally divided ſhare and ſhare alike.

The

The general queſtion was, whether the widow was intitled, not only to the whole ſurplus of the perſonal eſtate for life, but alſo to a moiety thereof abſolutely.

LORD CHANCELLOR.

The queſtion depends on the clauſe of the bequeſt of the reſidue, and on the intent of the teſtator from the whole frame of the will: the intent is plain; the only conſideration being, whether the teſtator has uſed proper words to expreſs it. Here is firſt an expreſs eſtate for life; which is not to be enlarged by ſubſequent implication; for that it muſt be very plain. *Relation* is a very general word, and takes in any kind of connection; but the moſt common uſe of it is to expreſs ſome ſort of kindred either by blood or affinity; though properly by blood. The teſtator certainly does not uſe it in the general ſenſe, nor in the vulgar ſenſe; becauſe he refers it to the ſtatute of diſtribution; which has nothing to do with affinity, but blood only. Then does it take in the wife? It cannot be ſaid there is no relation between huſband and wife; but the queſtion is, whether it be ſuch relation, as is here meant? he mentioned the ſtatute of diſtribution; it certainly means relations included in the ſtatute by *next* of *kin*, which words are in both the clauſes thereof uſed in oppoſition to a wife, *kindred* meaning of the ſame family and kind with the inteſtate. But this is not deciſive in the preſent caſe; it muſt receive the ſame conſtruction from the other part, where he gives it after the deceaſe of the wife, and puts her out of the caſe. It were abſurd to ſuppoſe, he meant the wife's executors to take with his relations: but it reſts not here: the whole frame muſt be conſidered; which was to give the wife a preſent maintenance, and a uſufructuary intereſt; and his veſting the whole in truſtees ſhews, he did not intend the abſolute property of the moiety in the wife; the creating the truſt being merely to preſerve the intereſt to thoſe, who were to take after her death: otherwiſe he would have given her this moiety abſolutely before creation of the truſt; and were the other conſtruction to prevail, the family pictures would after her death be divided among her executors as well as the relations: in the latter clauſe he certainly meant other relations beſides the wife; otherwiſe according to the ſtatute the wife ſhould have one moiety, and the reſt be ſhared. The intent therefore was, that the wife ſhould have the whole for life only: the other conſtruction would be ſtrained, and contrary thereto.

(85)

Caſe 49. Miller *verſus* Faure, *February* 10, 1747-8.

THOMAS JENNINGS deviſed the ſurplus of his perſonal eſtate to his brother and his heirs; and in default of iſſue at his death, then to be equally divided between his two ſiſters or their heirs. The brother died in the life of the teſtator leaving a ſon.

It was inſiſted, that, as the brother's repreſentative could not take, it ſhould go over to the ſiſters.

But Lord *Chancellor* held, that the contingency, upon which they were to take, never happened; and it was the ſame as if it had been upon a ſtranger's death, to whom nothing had been given before, who died in the teſtator's life leaving iſſue. Therefore it muſt be conſidered as an undiſpoſed part, and go according to the ſtatute of diſtribution.

Caſe 50. Millar *verſus* Turner, *Hilary Term*, *February* 11, 1747-8.

IN marriage articles it was recited, that the grandfather had given a bond for 2000*l.* to be raiſed for ſuch child or children of the marriage, as ſhould be living at the death of the father or mother: in default of children, to executors of huſband.

A poſthumous child within a proviſion in marriage articles for ſuch children of the marriage, as ſhould be living at the death of the father or mother.

The queſtion was, whether a child born after the death of the father ſhould be within this proviſion, and have a ſhare with the reſt.

LORD CHANCELLOR.

(86) There are many caſes, where a poſthumous child is conſidered as *in eſſe*, (t) as to take by deviſe, (u) to be vouched in warranty. There was a diſtinction, that where the eſtate veſted by purchaſe, an infant born after ſhould never de-veſt

(s) 1 Poſt 156.
(t) Poſt. 114. 1 Wms. 486. 245
(u) 1 Inſ. 390.

veſt it; according to the maxim of the common law, that an eſtate by purchaſe muſt veſt *eo inſtante*, that the laſt eſtate determines. But in *Reve* v. *Long*, the Houſe of Lords thought this hard; and therefore an act of parliament was made with a retroſpect to allow ſuch deviſe; which was an unuſual thing to do for a particular caſe. A bill has been brought in favour of ſuch infant to ſtay waſte, and an injunction granted: (x) the deſtruction of him is murder; which ſhews the law conſiders ſuch infant as a living creature: in all caſes relating to his advantage he muſt be conſidered as *in eſſe*, according to the rule of the *civil* law; ſo on the ſtatute of diſtribution he ſhall be conſidered as living; the intention being to provide for all the children; and if that be ſo, the ſame reaſoning will hold in a marriage-ſettlement, where the intention was to provide for all the children of the marriage. This caſe differs from *Muſgrave* v. *Parry*, 2 *Ver.* 710; for the teſtator there might have the relations, he knew, only in view; as he might have had a particular kindneſs for them: but on a marriage agreement, where a proviſion is making for the iſſue of that marriage, it is impoſſible they ſhould intend to exclude any child on the accident of his not being born till after his father's death. Suppoſe in this caſe a bill had been brought in the life of the grandfather, to compel him to give ſuch a bond: ſhould it not have been directed to be divided among all the children, whether born before or after the father's death? and the conſtruction muſt be the ſame now, as it would have been in life of the grandfather: and I found myſelf a good deal on this; for ſuppoſe before the ſtatute of 10 & 11 *Wm.* 3. (y) which eſtabliſhed a contingent remainder to a child not *in eſſe*, if there had been articles to ſettle, and a poſthumous ſon not mentioned; yet the court would have carried it on. This caſe too is ſtronger, as there is no other proviſion for the children of the marriage, it is to be conſtrued liberally: otherwiſe, if there was no other but this one child, he ſhould take nothing.

Troughton *verſus* Troughton, *February* 23, 1747-8. Caſe 51.

A Settlement is made by a father upon the marriage of his ſon, with a covenant that it ſhall be free from any incumbrance; in conſideration of which, the ſon

(x) 3 Inſ. 50. (y) 2 Ves. 230.

ſon covenants to reconvey part of the eſtate after the father's death, or to pay 30*l.* to ſuch perſon as the father ſhall appoint. The father created an incumbrance of
(87) 300*l.* by mortgage; and afterward appoints 300*l.* to his daughter, and dies.

The ſon brings a bill to have the eſtate diſincumbered of that mortgage: and alſo to have a bond of the father's to the mortgagee delivered up, and diſcharged out of the aſſets of the father.

LORD CHANCELLOR.

The plaintiff has a plain equity to have the eſtate diſincumbered of the mortgage brought on it, in fraud of the marriage-agreement.

Mortgagee may tack to his mortgage a bond by mortgagor againſt his heir at law; Not againſt purchaſer for valuable conſideration.

As to the bond: where the mortgagor of an eſtate, either before or after the mortgage, contracts another debt with the mortgagee, for which he gives a bond, and dies, and the equity of redemption deſcends to the heir at law, (z) a court of equity will permit the mortgagee to tack the bond to the mortgage; becauſe otherwiſe it would cauſe an unneceſſary circuity, aod the heir at law is debtor for both (a) but where the perſon claiming the equity of redemption is as a purchaſer for valuable conſideration, there is no right to tack the bond to the mortgage; becauſe the eſtate is not liable to the bond-debt Though the plaintiff is intitled to be indemnified as againſt the father, for what he is bound to pay by the father's bond, yet he is intitled only out of the father's aſſets.

Then the queſtion is, how far this 300*l.* charged on the eſtate disjunctively, is liable to indemnify the plaintiff? He is intitled to be reimburſed out of this 300*l.* and intereſt, if the father's eſtate is not ſufficient. The ſon's covenant was part of the conſideration moving from him for the ſettlement made on him by the father; in fraud of which was the incumbrance made; and the queſtion is, whether any perſon claiming from the father ſhall take back this eſtate of 300*l.* out of it; without letting the ſon, who is a purchaſer, have the benefit of the ſame agreement? which would be contrary to the rule of all agreements, that they muſt be performed on both ſides. But

Agreements mutual

it

(z) 1 Vern. 244, 245. 2 Ch. Rep. 23, 164. 1 Wms. 775. 3 Atk. 556.
(a) Prec. Chan. 89. 2 Eq. Ca. Ab. 594. 2 Str. 1107. 1 Wms. 775.

it is ſaid, that this differs, becauſe the intent was to provide for the ſiſter of the plaintiff by this 300*l.* who ſtands equally in the light of a purchaſer for valuable conſideration as the plaintiff; and that therefore, although the father has broke the covenant, yet this ſhall not be taken from the daughter, who muſt be put on the ſame foot as children, from whence nothing can be taken; but reſort muſt be had to the aſſets of the perſon making the ſettlement; and that is true: but here the daughter was only in a ſecondary light; it being for the father's benefit, who might direct it to be paid to a ſtranger; by whom it could not then be claimed by voluntary appointment from the father, letting this incumbrance remain. It is like the caſe of a purchaſer diſcovering an incumbrance, who ſhall retain ſo much for it, as remains in his hands: and this 300*l.* being part of the conſideration of the ſettlement, is in the ſame light. If it was intended for the daughter, it would have been put ſo; for ſhe was in the power of the father; and there is no other way of making the father to have acted fairly, but by conſidering this mortgage as an appointment of ſo much; the father's aſſets muſt be firſt applied, and if not ſufficient to ſatisfy both the bond and mortgage, the plaintiff is intitled to retain out of the 300*l.* the remainder whereof to go to the appointee.

(88)

Purchaſer diſcovering an incumbrance may retain ſo much.

Shiſh *verſus* Foſter, & *e con.* *February* 26, 1747-8. Caſe 52.

THE bill was to ſet aſide a ſtated account and releaſe, obtained from the plaintiff on his coming of age, by the defendant, his guardian and executor to his father, without delivering an inventory, or laying vouchers before him. It was admitted that there were falſe recitals, and ſeveral errors therein; and a general account was directed.

Conveyance of an eſtate to which defendant is intitled in equity, ſuſpended till an account of the reſt of the eſtate taken, from the danger of the plaintiff's loſing his demand.

The croſs bill was brought for a copyhold eſtate, to which the defendant *Foſter* was intitled by agreement with the plaintiff's father for 800*l.* though it was not ſurrendered.

The queſtion was, whether it ſhould be immediately taken out of the hands of the plaintiff, or not till after the

(b) 1 Brown 301.

the account taken; as it was inſiſted for the plaintiff that it ſhould not, becauſe both parties being obliged to come into a court of equity, thoſe who will have it, muſt do equity: and it was equal equity that the defendant ſhould make ſatisfaction for any part of the eſtate come to his hands, as that the plaintiff ſhould convey the eſtate come to him.

LORD CHANCELLOR.

The rule that he who will have equity muſt do it, holds not ſo as to tack together things independent, but the court will lay hold of any circumſtance for it, as danger from abſconding or living abroad.

That rule does not hold throughout: ſo as to tack things together which are independent in their own nature; but wherever the court can do it, they will lay hold of any circumſtance for it: and here there is danger of the plaintiff's loſing his demand, if the eſtate ſhould be taken from him, the defendant having frequently abſconded; which makes it very like the caſe of *Jacobſon* v. *Hans Towns*, (or merchants of *Almaign*) of part of whoſe eſtate the plaintiff *Jacobſon* and his family had been leſſees, and negociated it for them. They brought an ejectment to recover, when the leaſehold eſtate was expired. *Jacobſon* objected, that he was a creditor in a long account for negociating, *&c.* and brought a bill, that they ſhould not take the eſtate from him, till he received ſatisfaction for his demand; and an injunction was granted by Lord *Macclesfield*, and continued by Lord *King*: not that he had any real lien on the eſtate; but from the difficulty of his getting ſatisfaction, if this eſtate was taken from him, as they were a corporation reſiding beyond ſea: therefore they were reſtrained from recovering. The ſame reaſon weighs here as there; and the conveyance muſt be ſuſpended till the account is taken: nor ſhould *Foſter* have a ſpecifick performance of the agreement, till he has accounted for the reſt of the eſtate.

(89)

Caſe 53. Tilburgh *verſus* Barbut, *March* 2, 1747-8.

Deviſe to one and his heirs; and if he died without heirs, remainder to his half brother; the deviſe a fee, and the remainder void.

A MAN deviſed to his ſon and his heirs: and if he died without heirs, remainder over to another, who was half brother to the firſt deviſee.

A queſtion was made, whether the firſt limitation was in fee, or in tail ſo as to let in the remainder? and it was inſiſted

fiſted, that the doctrine, which excluded the half blood from inheriting, was without any ground.

Lord Chancellor allowed that: but ſaid, this was a plain caſe; (c) and one of thoſe points which the court will not ſuffer to be argued, as being determined before: that he believed in all the caſes, where a fee is mounted on a fee, the teſtator intended it ſhould go over, but did not uſe proper words; and that he muſt conſtrue it *heirs* generally, unleſs there were ſome words in the will to reſtrain it to *iſſue*; nor could he go on the preſumption, that the teſtator did not know the law: this was a deviſe over to a ſtranger, as the law conſiders him, and who could not in any event inherit as heir to his brother. The bill was therefore diſmiſſed. Tyte v. Willis. Talb. 1.

Mendes *verſus* Mendes, *March* 11, 1747-8. Caſe 54.

ALVARO MENDES, May 8, 1728, made his will in this manner; "I give 6000*l.* to one daughter, and 5000*l.* to another; and if either or both die before marriage or 26, the legacy with the increaſe or intereſt ſhall go equally to and among my two ſons *M.* and *J.* and I direct, that my wife ſhall have the education and maintenance of my children: and all the reſt and reſidue of my eſtate both real and perſonal, I give to my ſaid two ſons equally ſhare and ſhare alike; and in caſe of the death of either of them, the whole reſidue to the ſurvivor: if both die without leaving lawful iſſue, then half to my wife, and the other half to my two daughters equally, and their iſſue; and for want of ſuch iſſue, to the ſurvivor: and if all my four children die without leaving iſſue, then to be divided among collateral relations." There was a *memorandum* in the concluſion, deſiring 600*l. per Ann.* ſhould be allowed to his wife, for the children's maintenance, 100*l.* for each girl, 200*l.* for each boy; and in caſe of the death of any of the children, the inheritor or inheritors are to pay their ſhares or proportions, ſo that the ſaid 600*l. per Ann.* ſhould not be deficient.

Sons, by a reaſonable conſtruction of their father's will, intitled to their legacies intended as portions or an advancement for them, at 21, though the words did not warrant it.

The ſons having attained twenty-one, brought a bill to

(c) 1 Brown, 147. Eg. Aq. 305. 1 Wms. 70. 1 Wms 23. where a deviſe by a father to a ſecond ſon and his heirs for ever, and for want of ſuch heirs, then to teſtator's right heirs was held an eſtate tail, ſecus if the deviſe had been to a ſtranger. Vide Douglas 251, where *heirs* not being reſtrained by any ſubſequent words, a fee was held to paſs; ſecus if there had been reſtraining words ſubſequent, as in Cowper 234, 410.

to have their portions paid to them, not ſubject to any contingency.

It was admitted there was no real eſtate.

LORD CHANCELLOR.

This is a very incautious will, and it is difficult to find ſuch a conſtruction, as upon all the parts of it will ſatisfy one's mind: but this foundation muſt be gone upon; that it is a will by a father making proviſion for his wife and children; in which he muſt be preſumed, unleſs there are expreſs words to the contrary, to make ſuch a one, as would anſwer an advancement and portion: otherwiſe it were to ſuppoſe him to act unnaturally. In order thereto, if the words will bear it, ſuch a conſtruction muſt be made, as will enable them thereby to provide for a wife and children; otherwiſe it would not anſwer a paternal diſpoſition. In this view to conſider the will, the firſt difficulty ariſes on the clauſe diſpoſing of the reſidue to the ſons; and on the death of either to the ſurvivor; what is the meaning of thoſe words, and the contingency there deſcribed? The ſons were then extremely young; it is admitted on both ſides, that thoſe words muſt receive a reaſonable conſtruction, and be reſtrained to a death under particular circumſtances; becauſe he knew by the courſe of nature, they muſt die, and might live long and have children; in which caſe he could not intend it. It is contended for the plaintiffs, that the true conſtruction is, that they are tied up to a death without iſſue in the life of the teſtator; but that could not be meant; becauſe in all the proviſions of the will, where he uſed thoſe words, he means after his own death, and after his will takes place; as is plain, where he gives the portions to the daughters reſpectively, &c. of which there could be no increaſe or intereſt till after his death. Another conſtruction inſiſted on for the plaintiffs is, that it ſhould be confined to a death without iſſue before twenty-one, then to be veſted, divided and paid: to which it is objected, that although that would be a reaſonable conſtruction, yet there are not words to warrant it, but upon the whole that is the true conſtruction; for the teſtator, wherever he uſes thoſe words, means a death of the children before ſuch time as they would want their portions: this conſtruction ariſes alſo, where he directs the maintenance; being a declaration of his will, that the
(91) wife ſhould have the education of the children; which I think, might amount to a deviſe of the guardianſhip,

(though

(though it is not neceſſary to determine that), and then it would be clearly till they arrive at twenty-one. But it muſt receive the ſame conſtruction, although it ſhould not amount to a deviſe of the guardianſhip. It is true, a guardianſhip in *ſocage* determines at the age of fourteen, but here are no *ſocage* lands; therefore it will import a guardianſhip till twenty-one. Then the diſpoſition of the will muſt be altered, and the *memorandum* inſerted here, where he directs the maintenance; for it is not a codicil or diſtinct inſtrument, but one entire inſtrument, and would have been interlined, had there been room: the meaning of it was to keep up the fund 600*l. per Ann.* entire, although ſome of the children ſhould die during their minority. The inheritors, who were to make it up, mean thoſe who took the ſhares as ſurvivors of thoſe dying; the death of any children there is clearly before twenty-one: the effect then, that this will have on the next clauſe relating to the reſidue is, that it muſt be conſtrued in the ſame ſenſe as he has uſed juſt before; which will alſo anſwer all the intent of the father. In this clauſe of maintenance, I take in the marriage of the daughters; (d) which would determine the guardianſhip of them, though not of the ſons: as was adjudged in the caſe of Lord *Shafteſbury:* but there are beſides, the words *without leaving lawful iſſue*; and death there in every part muſt be confined to a death before twenty-one, in the caſe of the ſons; or before marriage in the caſe of daughters. Theſe words explain alſo the former death without iſſue; ſo that if they had married before twenty-one, and had lawful iſſue, the portion ſhould not go over. All the contingencies then being out of the cauſe, and the ſons having attained twenty-one, they are intitled to their portions: the other conſtruction would be harſh, and hinder them from making any proviſion for a wife; and therefore it is very happy that that memorandum was added.

A direction in a will that the wife ſhould have the education may amount to deviſe of the guardianſhip.

The guardianſhip of daughters determined by marriage, not ſo of ſons.

Benſon *verſus* Dean and Chapter of *York*, *March* 1747-8. Caſe 55.

A Queſtion aroſe upon the conſtruction of the ſtatute 29 *C.* 2. 8. made for perpetuating the augmentations of poor vicarages, and upon the facts, how far they enabled the plaintiff to avail himſelf of that conſtruction, ſo as to be intitled to the benefit of ſuch augmentation, which was

Conſtruction upon 29 *C.* 2. 8. for perpetuating augmentations of poor vicarages.

(d) Guardianſhip not deſtroyed becauſe of marriage, poſt, 160,

was in this caſe reſerved in general words: and it was proved that it had been conſtantly paid from 1661 to 1743, to the vicar of this pariſh.

LORD CHANCELLOR.

(92) By the vacancies happening in the church preferments, upon the great alteration of the conſtitution by the ſequeſtration and ſale of them, there were great eſtates and incomes likely to ariſe to the perſons who ſhould then fill thoſe incumbencies: it was therefore not to be wondered at, if a diviſion was ſought after: but the coming of theſe great fines to the preſent poſſeſſors was not the only reaſon for the augmentation; not extending to the ſucceſſion, which would ſtill be confined to the reſerved rents: but there was another reaſon; becauſe the inheritance of theſe eſtates were greatly improved by being purchaſed by private perſons, as particularly a great one by *Chief Juſtice St. John*. It was therefore proper, they ſhould be under obligation to apply it to augment poor vicarages. That produced the *King*'s letter, upon which the act was afterward made; the conſtruction whereof is to be conſidered.

In this church it is to be preſumed, and in ſeveral others, that ſuch reſervation was made upon the leaſes, then granted by way of augmentation, as was moſt natural to give it to poor vicarages impropriate. It was originally the regular clergy that plundered the church, although by the diſſolution of monaſteries it came into the hands of the laity. Upon the nature of this reſervation, the terms of the act, and the fact of conſtant payment, I think, there was an appropriation for the augmentation of the vicarage in queſtion. The act ſuppoſes, the reſervation might be made differently; in ſome appropriated, in others not: it intended to eſtabliſh ſome of theſe reſervations, where the reſervation was not made to the vicars or curates, as the recital of the preamble ſhews. The queſtion then is, whether this appears to be intended to be reſerved for the benefit of the vicar or curate, though not reſerved to him; the act intending to take in not only caſes of expreſs reſervation, but alſo of intent: and here that conſtant regular payment for ſo long a time, is the ſtrongeſt evidence poſſible, that it was ſo intended. Another clauſe in the act appears to be intended for ſome caſes, where there had been a general reſervation and an agreement for application of part for the augmentation of ſome poor vicarages; within which clauſe this ſeems a caſe intended to be brought; and

and ſuch uſage of payment is the ſtrongeſt evidence of ſuch agreement. Another clauſe is material, *viz.* That if a queſtion ſhould ariſe concerning the validity of ſuch grants, ſuch favourable conſtruction ſhall be made for the benefit of the vicar, as has been made in commiſſions for charitable uſes, which, I think, is the ſame as I have made here. I know but one caſe upon this act, in 3 *Lev.* 82. which I mention for the particular manner of declaration, and ſuch as I never ſaw, (*quam pene ſe habet*) which the court allowed of there. The dean and chapter might be tempted to take theſe augmentations to their own livings; I do not ſay they have done it, but it would be inconvenient to leave them ſuch a power, and ſafer to pin them down: upon the whole, the plaintiff and his ſucceſſors are intitled to the benefit of this augmentation; and it is not in the power of this body to diſappropriate it, and give it to any other.

The rule, upon which the commiſſioners for poor vicarages upon the ſtatute of *Queen Anne* have gone, in judging what is a poor living, is to value only the certain tithes the vicar was intitled to, not the uncertain; ſuch as in towns where it depended on his good behaviour.

Revel *verſus* Watkinſon, *June* 11, 1748. Caſe 56.

ROBERT REVEL deviſes his eſtate in truſt out of the rents and profits to raiſe by leaſing, mortgage, or ſale, enough to pay what his perſonal eſtate ſhould be deficient to pay: and ſubject thereto in truſt for his only daughter in ſtrict ſettlement, remainder in ſtrict ſettlement to his brother; remainder over.

Deviſe, ſubject to pay debts and legacies, to a daughter in ſtrict ſettlement, remainder over, the eſtate not ſufficient to keep down the intereſt during the life of a jointreſs by a prior ſettlement, though more than ſufficient afterwards, the jointreſs living two years and for life, arrear accrued: the whole profits during the daughter's eſtate *L* ſhall be applied to keep down the intereſt; the ſurplus ariſing on death of the jointreſs being accrued to the ſame truſt eſtate, muſt be applied to anſwer the former deficiency, and not to let it charge the remainder.

The eſtate deviſed to the daughter was not ſufficient to keep down the intereſt during the life of the mother, who had a jointure upon the eſtate by a prior ſettlement: although, upon her jointure's falling in, it was more than ſufficient. But the mother living two years, an arrear of intereſt accrued.

The

The daughter married the defendant *Pegg*, and died without iſſue. The brother of the teſtator brought this bill to have 400*l.* which had been paid by the truſtee to the defendant *Pegg*, applied in payment of the debts.

LORD CHANCELLOR.

Two things are very plain. Firſt, that originally, and according to the nature of this truſt and courſe of this court, the plaintiff has a right to have this 400*l.* ſo applied: but ſecondly, it is as plain on the part of the defendant, that though the whole eſtate is liable in reſpect of creditors; yet, as between tenant for life, and him in reverſion, the tenant for life is only obliged to keep down the intereſt: for the court will not conſtrue it ſo as to exhauſt the profits during his life, without ſomething particular. The word *leaſing* makes no difference; *mortgage* or *ſale* coming after: and wherever thoſe words are inſerted, there is no inſtance of the court obliging a tenant for life to do more than keep down the intereſt, unleſs there are particular directions, that all the profits ſhould be applied. The reaſon of the determination in *Ivy* v. *Gilbert*, 2 *Wm.* 13. was, that although the words *rents* and *profits*, uſed generally without more, imply a power to ſell; yet the teſtator had there explained and reſtrained it by the ſubſequent word *leaſing*: but no doubt was made, that if the words *mortgage* or *ſale* were added, the inheritance ſhould have borne the burthen.

(94)

But the daughter muſt be allowed a maintenance during life of the jointreſs; being as a child unprovided for.

The next queſtion, though new in *ſpecie*, is alſo clear: whether, here being compriſed in the truſt an eſtate in poſſeſſion, and alſo in reverſion (upon the death of the jointreſs) which, when it fell into poſſeſſion, would be liable to the ſame truſt, the tenant for life is bound to keep down the intereſt only, as the profits came into poſſeſſion from year to year: or whether the whole profits, as far as they will go, during the eſtate for life, ſhould be ſo applied to anſwer the deficiency in the mother's life?

Secondly, taking it either way, whether the daughter was intitled to any allowance of maintenance during the mother's life?

As to the firſt: I am of opinion, that the whole profits during the continuance of the eſtate for life, ſhould be applied to keep down the intereſt during that eſtate. It is only

only by conſtruction in equity, that tenant for life ſhould pay only the intereſt; as otherwiſe the creditor would come upon him for the principal. If there is tenant for life, remainder for life, and during the firſt eſtate for life, the whole profits are not ſufficient to anſwer the intereſt of the debts, ſo that there is an arrear: I agree to what is ſaid for the defendant, that it ſhall be a charge upon the inheritance, when it is by the ſame ſettlement; tenant for life being then only obliged to keep down the intereſt incurred during his own life: but that is not the preſent caſe; for here the mother's eſtate for life was by another ſettlement; during whoſe life the profits of the eſtate in poſſeſſion were not ſufficient to keep down the intereſt, but afterward more than ſufficient. That ſurplus being an accruer to the truſt eſtate muſt be applied to anſwer the former deficiency; and the truſt muſt be conſidered as entire during the daughter's eſtate for life. Any other conſtruction would create inconvenience and confuſion; for theſe truſt eſtates partly in reverſion and partly in poſſeſſion, are very frequent: and if tenant for life, upon eſtates dropping in, ſhould receive the profits from the fines, and let out at a rack-rent, without applying the profits to the arrears incurred before, there would be a great arrear upon the remainder man. Nay, were the eſtate accidentally improved, it ought to be ſo applied; or if a loſs happened by tenants, the profits coming in afterward ſhould be ſo applied.

But then the daughter muſt be allowed a maintenance out of this truſt eſtate during the mother's life; for ſhe (95) ſtands entirely in the light of a child unprovided for during that time, and at the mother's pleaſure: and the court will not, in favour of a remainder man, ſuffer all the ſurplus profits to be exhauſted to diſcharge the intereſt in exoneration of the eſtate, and leave a daughter and heir at law to ſtarve: for which I can cite a ſtronger caſe; that of *Butler* of *Woodhall* before Lord *Harcourt*, where, though it was in the caſe of a nephew, and all the profits of the eſtate deviſed ſubject to the truſt of payment of debts, yet the court held the uncle could not intend his nephew ſhould ſtarve; and directed a reaſonable maintenance to be paid him out of the profits; it appearing the creditors were ſafe, or ſubmitting to it. Then ſurely the court will do it for a child, and when the diſtribution of it is in the power of the court: and a legacy to a child payable at a future day ſhall carry intereſt, where it would not in the caſe of another perſon: and upon this foot muſt the account be taken.

Arnot

Caſe 57. Arnot *verſus* Biſcoe, *June* 13, 1748.

Attorney on ſale of an eſtate not diſcloſing to the buyer an incumbrance, liable to make ſatisfaction; which is different from diſcloſing the ſecrets and circumſtances of his client.

THE defendant *Biſcoe* acted as an agent for the other defendant *Stephens*; who wanting money, propoſed to the plaintiff the ſale of a leaſehold eſtate: the plaintiff entered into articles for it, paying 5 *ol.* in part, for which ſum he took a bond from *Stephens*; but before the execution of the conveyance, the plaintiff diſcovered that it was incumbered with a mortgage, on which there had been a decree of foreclosure in *Chancery*.

Whereupon he brought a bill againſt *Biſcoe* for the 500*l.* in default of *Stephens*; charging that *Biſcoe* did not diſcloſe the incumbrance, but declared the title to be in every reſpect good, for which the only witneſs was the plaintiff's ſon; and it was denied by the anſwer of *Biſcoe*.

LORD CHANCELLOR.

There are two conſiderations in this caſe: Firſt, the general equity, upon which the plaintiff has brought his bill; which is not in *ſpecie* a common equity. Secondly, the queſtion of the fact: whether there is ſufficient evidence againſt the defendant to enable the court to make a decree againſt him, upon this principle of equity, that in tranſacting a purchaſe or bargain, wherever the buyer is drawn in by miſrepreſentation or concealment of a material fact or circumſtance, ſo as to be injured thereby, and that done with intention and fraud, he is intitled to ſatisfaction here? Which is the general principle, and is carried to a particular inſtance; where done by any perſon who is attorney or agent, not only of the buyer but ſeller.

(96)

The general rule is true with regard to all perſons having intereſt in the eſtate; and alſo with regard to the attorney, agent, or ſolicitor of the buyer; having a truſt and duty with his principal; and is liable to make ſatisfaction, if participant in the tranſaction; as was partly the caſe of one *Cant*, who was employed on both ſides; which often

(e) In 1 Wms. 393. where a firſt mortgagee is witneſs to a ſecond mortgagee, this ſhall poſtpone him, tho' no proof of his knowledge of the contents of the ſecond mortgage, but in 1 Brown, 357. Lord Thurlow diſapproves of this decree, as a witneſs is not privy to the contents of the deed. 2 Atk. 49.

often happen in purchaſes, although more frequently in mortgages. And if the attorney of vendor of an eſtate, knowing of incumbrances thereon, treats for his client in the ſale thereof without diſcloſing them to the purchaſer or contractor, knowing him a ſtranger thereto, but repreſents it ſo as to induce the buyer to truſt his money upon it, a remedy lies againſt him in a court of equity: to which principle it is neceſſary for the court to adhere, to preſerve integrity and fair dealing between man and man; moſt tranſactions being by the intervention of an attorney or ſolicitor. I diſtinguiſh greatly between this and not diſcloſing the general circumſtances of his client, with the knowledge of which he is truſted, of which it would be improper to give notice: but otherwiſe when dealing for the purchaſe of an eſtate. This principle is not to be doubted in the caſe of vendor himſelf, or of a perſon who had intereſt, knowing of the tranſaction or purchaſe: which was the foundation of the decree by Lord *Cowper*, where a mortgage was made of an eſtate tail, without ſuffering a recovery: the perſon who was iſſue or remainder in tail, was clerk to the attorney, and ingroſſed the conveyance, without diſcloſing his title, though knowing of it. Upon a bill for foreclоſure, when he inſiſted on his title, the mortgage was made effectual againſt him, on this circumſtance of privity; which was held fraudulent, without any other particular fraud; although at the time of the fraud he was a minor about twenty, of ſuch an age as that his contract would not affect him. Then the connexion between an attorney and his client cannot be a ſtronger excuſe for him, than the iſſue or remainder man in tail had in that caſe; it would otherwiſe be dangerous, if the attorney of vendor ſhould not diſcloſe ſuch incumbrances; which is not diſcloſing ſecrets, or the circumſtances of his client, but what the purchaſer has a right to know. This therefore is a good equity for the plaintiff againſt *Biſcoe* in default of the other defendant, if it comes out ſo.

The next conſideration is, whether there is ſufficient proof to bring this within this equity?

But firſt, ſome objections muſt be taken notice of; that here the 500*l.* was not advanced by the plaintiff on the credit or ſecurity of the eſtate; that therefore if the incumbrance was diſcloſed at the time of the conveyance, not of the articles; it is ſufficient; which is true in ſome degree: but in general it is fair and right, that it ſhould be diſcloſed at the time of the articles; for then the plaintiff might not

not have proceeded in his purchaſe: but taking it to be as the time of the execution of the articles, it muſt be where they are executed entirely; not where partly at the time of the articles, and part of the money then advanced; for then it was as juſt, that the plaintiff ſhould know of the incumbrance, as it would be in general at the execution of the conveyance.

But it is objected farther, that the plaintiff took a bond; but that was for farther ſecurity: if a mortgage was made of this leaſehold eſtate, a bond would be taken; ſo that the taking the bond does not differ it.

One witneſs not ſufficient if denied poſitively by anſwer, unleſs corroborated by circumſtances. 1 Brown, 52 2 Atk. 19. 3 Atk 407. 649. Ante 66. Poſt. 125.

As to the material fact of equity, though there is but a ſingle witneſs for the plaintiff, and that to be taken with the connection between father and ſon, it is evidence here; though not by another law. (f) But if this ſingle evidence is denied by the anſwer, there is not ſufficient to decree upon, and the bill muſt be diſmiſſed, which is the rule: but the anſwer is not *ad diem*, the charge being poſitive, and the anſwer only to belief; which is not ſufficient to contradict what is poſitively ſworn: nor could he be convicted of perjury thereon.

On the fact, upon which I doubt, I think the evidence not clear enough to make a decree; but will ſend it to law to be tried on two iſſues: Firſt whether *Biſcoe*, or any perſon concerned for him in the purchaſe, gave notice to the plaintiff of this incumbrance? Secondly, whether at or before the execution of the articles and bond, or either of them, the plaintiff, or any perſon for him, was informed thereof?

Caſe 58. Ld Farrant *verſus* Spencer, *June* 14, 1748.

Deviſe by a fea captain of all houſehold furniture, linen, plate and apparel whatſoever, includes only what is for domeſtic uſe, not what for trade or merchandiſe.

JAMES SAUNDERS, captain of an *Eaſt India ſhip*, deviſed 1000*l.* (g) a-piece to *M.* and *C.* to be paid at twenty-one or marriage; then gives them all his houſehold furniture, linen, plate and apparel whatſoever; and in caſe of the death of either before marriage, every thing as before

(f) 1 Vern. 161. (g) 1 Eq. Ab. 200. 3 Atk. 61,

before bequeathed, to go to the ſurvivor or their iſſue: "I mean if either of them die unmarried before me." Then the reſidue gave to be divided into fifths; two parts to *M.* and *C.* or their iſſue, in default thereof to the ſurvivor or their iſſue, one part to *W. S.* or his iſſue; another fifth part to *B. S.* and her children.

The firſt queſtion was of the extent of the ſpecific bequeſt; which it was argued, ſhould take in all plate whatſoever, *India* and dimity goods, and ſome rough diamonds.

Againſt which was cited the caſe of the Duke of *Beauſort* v. Lord *Dundonald*, 2 *Ver.* (98)

Lord Chancellor ſaid, That caſe depended on the locality of the deſcription; and directed this to be ſent to a maſter, to diſtinguiſh what goods he had for his own domeſtic uſe, and what for trade or merchandiſe; without which it was impoſſible to determine of the extent of the bequeſt; for it clearly included only the former, according to the opinion of the Houſe of Lords, in *Prat* v. *Jackſon*, 2 *Wms.* 302. which decree was the ſtronger, becauſe of the words houſehold ſtuff; as alſo becauſe it was a conſtruction to be made of marriage articles, where the wife was a purchaſer, of what ſhe was to claim; here they are only voluntary.

On the other part of the will, *Lord Chancellor* took the teſtator's meaning to be, to deviſe to ſuch legatees or their iſſue, as he knew not whether they had children living or not; but to ſuch as he knew had children living he gave it jointly to them and their children.

But was he not of that opinion, he could not conſtrue it ſo as to make it void: but would conſtrue the word *or*, *and*, and ſo veſt it in the parents, the firſt takers.

N. It was ſaid at the bar to have been determined by his lordſhip, that medals would paſs by a deviſe of money, where kept with money; not where kept diſtinct.

Randal *verſus* Cockran, *June* 17, 1748. Caſe 59.

THE King having granted general letters of repriſal on the *Spaniards* for the benefit of his ſubjects, in conſideration of the loſſes they ſuſtained by unjuſt captures; Inſurer after ſatisfaction ſtands in place of the aſſured as to the goods ſalvage, and reſtitution in proportion for what he paid.

the commiſſioners would not ſuffer the inſurers to make claim to part of the prizes, but the owners only, although they were already ſatisfied for their loſs by the inſurers; who thereupon brought the preſent bill.

Lord Chancellor was of opinion, that the plaintiffs had the plaineſt equity that could be. The perſon originally ſuſtaining the loſs was the owner; but after ſatisfaction made to him, the inſurer. No doubt, but from that time, as to the goods themſelves, if reſtored in *ſpecie*, or compenſation made for them, the aſſured ſtands as a truſtee for the inſurer, in proportion for what he paid; although the commiſſioners did right in avoiding being intangled in accounts, and in adjuſting the proportion between them. Their commiſſion was limited in time; they ſee who was owner; nor was it material to them, to whom he aſſigned his intereſt, as it was in effect after ſatisfaction made.

(99)

Caſe 60. Swynſen *verſus* Scawen, *June* 18, 1748.

A debt by covenant in marriage articles, and no mention of intereſt: the court would not reduce it lower than 5 *per cent.*

SIR *Thomas Scawen* having three ſons, gives in his life-time 6000*l.* to *Lewis* the elder; and upon the marriage of *Lewis*, covenants to give or leave him 4000*l.* more: but there is no mention of any intereſt in the deed.

To the two younger ſons he deviſes the ſurplus of his perſonal eſtate, and a real eſtate after the death of their mother: and to each of the children 200*l.* for mourning.

Upon his death *Lewis* borrows 4000*l.* from the plaintiff, and dies. The plaintiff, as his adminiſtrator, brings a bill for a ſatisfaction out of the father's aſſets for the 4000*l.* due to *Lewis*, and for the 200*l.* legacy, with intereſt at five *per cent.* for both ſums.

Againſt this it was argued, that the two younger ſons had a much leſs ſhare than *Lewis*; and that the court ſhould not add to the inequality: this 4000*l.* was not a debt on the eſtate, but ſhould follow the nature of a legacy; the rate of intereſt for which, where none is mentioned, is in the diſcretion of the court.

LORD

LORD CHANCELLOR.

Had the younger children no other proviſion than the ſurplus, which is likely to come out ſo much below the ſhare of *Lewis*, I ſhould have endeavoured to have added to that ſurplus; but for what appears, they may have an equal proviſion with the other, by the remainder of a real eſtate, after the death of the mother, who is now very ancient. But had it been otherwiſe, this 4000*l.* under the marriage articles, is not in the power of the court; not being a voluntary proviſion or legacy, or falling under any of the rules in which the court exerciſes a diſcretion; but it is a debt by covenant, affecting both real and perſonal aſſets; and for which an action at law might be brought, wherein a jury would have computed intereſt at five *per cent.* There is no ground then for a court of equity to vary the right upon a debt contracted for the moſt valuable conſideration, marriage: but were there any colour for reducing the intereſt, there is the ſtrongeſt reaſon againſt it, *viz.* his borrowing of 4000*l.* at five *per cent.* which ſpeaks, that he was intitled thereto as a debt from his father's death; which not being then paid to him, he therefore borrowed a ſum equal to it.

As to the 200*l.* legacy, the general rule is, that where there is an ample perſonal eſtate, a perſonal legacy will carry five *per cent.* although the court ſometimes exerciſes more liberal diſcretion in caſes of younger children, or where charged upon land. If the court was always in theſe caſes to enter into inquiries, how much the perſonal eſtate would produce, it would be inconvenient; although the court ſometimes does it in family caſes, where all ariſes out of the father's will, and all of the ſame kind, and a deficiency likely to happen: but this is for mourning; which, if he has acted properly with reſpect to his father, he has already expended out of his own pocket: and the plaintiff is intitled alſo to five *per cent.* for this.

Legacy for mourning out of perſonal eſtate carried 5 *per cent.*

Clarke *verſus* Samſon, *June* 21, 1748. Caſe 61.

A. Dies indebted; leaving a perſonal eſtate conſiſting partly in leaſehold, which was ſubject to incumbrances by mortgage with covenant for payment of the mortgage money; having deviſed this leaſehold, with other eſtates,

Where the iſſue of the marriage is not intitled to have this eſtate ſettled on the marriage diſincumbered out of their father's eſtate.

tates, to his ſon for life, and after his deceaſe to the iſſue of his body, with limitations over; making him executor and reſiduary legatee. Not long after his death the ſon makes a ſettlement thereof upon his marriage; and deſcribing himſelf as heir and executor of his father, and reciting and referring to the will and the limitations therein, and reciting the intended marriage and jointure, grants and aſſigns this leaſehold eſtate to truſtees to permit him and his aſſigns to receive the profits during life, then to his wife, then to the iſſue male and female, then to ſuch other perſon who ſhould claim it by will of his father. After the death of him and his wife, their iſſue bring a bill to have an aſſignment by the truſtees; inſiſting that the ſettlement being for valuable conſideration, although there was no expreſs covenant to diſincumber it, their father had obliged himſelf thereto.

LORD CHANCELLOR.

There is ſomething particular and ſpecial in this caſe; but upon the whole circumſtances the plaintiffs are not intitled to the relief ſought; which is ſought in prejudice of their father's creditors; for if it were otherwiſe, it would be immaterial to controvert this point; this leaſehold being perſonal eſtate; the reſidue of which the plaintiffs are intitled to. As this ſtood originally on the will of the grandfather, this leaſehold being part of his perſonal eſtate was ſubject to theſe mortgages; and the equity of redemption ſubject to all the reſt of his debts, even by ſimple contract; but being ſpecifically deviſed, other parts of the perſonal eſtate ought to be firſt applied; and if the father pays off the debts with his own money, he will have a right to ſtand in the place of the creditors to receive ſatisfaction out of aſſets.

(101) But then the queſtion ariſes of the effect of the father's ſettlement: and whether it gives a right to have the eſtate diſincumbered for the plaintiff's benefit. I am of opinion, that from the nature of it, they have not ſuch a right: I agree, that the father being executor might, according to the rules of law and equity, if he wanted money to pay, have ſold and applied it to payment of debts, and the vendee might retain it againſt all claiming under the will, if no fraud or colluſion. But the queſtion is, What was the intent of the parties in this ſettlement? They knew they were making a ſettlement of the eſtate of the grandfather; and

and muſt know, that this with other aſſets was liable to his debts; and there being no covenant by the father to diſincumber it, the intent was to leave it on the will, with regard to the iſſue of the marriage; and it ſeems to be made only to clear a doubt, whether the iſſue could take by purchaſe? There is no ground therefore to oblige the father out of his own eſtate to diſincumber it: but it is ſaid, the word *grant* of itſelf imports a covenant; which it does at law: but that is where there is no particular covenant, which there is here; and there is no inſtance where the court conſtrues that general word to diſincumber an eſtate, generally againſt every one, where there is a particular covenant in that deed, which limits the operation of it. Upon the whole therefore, the intent was to take this eſtate in the manner left by the grandfather's will, ſubject to his debts: but the father having paid them off, if the queſtion was between the plaintiffs and any perſon taking voluntarily under the father's will, who had made any other reſiduary legatee, I ſhould have thought, the plaintiffs had good right to have that perſonal eſtate ſo applied; but being between the plaintiffs and creditors, and no covenant, (except what reſtrains the word *grant*) it would be a ſtretch of equity toward injuſtice, ſhould the plaintiffs have this eſtate ſo as to leave their father's debts unſatisfied.

Saville *verſus* Tankred, *June* 21, 1748. Caſe 62.

THE bill was brought for an account, and for the delivery of a ſtrong box, which was in the cuſtody of the defendant, and in which were found jewels and a note in theſe words, "Jewels belonging to the Duke of *Devonſhire*, in the hands of Mr. *Saville*;" whoſe repreſentative the plaintiff was, and in whoſe poſſeſſion they had been from 1695 to 1745. Objection for want of parties.

An objection was made, that the *Duke's* repreſentative ſhould have been made party, to ſee if he claimed them; becauſe it was ſaid expreſsly, that they were his, and nothing ſaid of an aſſignment to *Saville*.

Lord Chancellor over-ruled the objection: for pawnee of a pledge, as *Saville* was, may bring *trover* or *detinue* at law for it without troubling himſelf with the pawner; for he has a ſpecial property. But ſuppoſe he was not pawnee, (102)

(h) 1 Brown, 368.

pawnee, but had only the poſſeſſion of them, and delivered them to another: that perſon has nothing to do with the *Duke*. Therefore let theſe jewels come into his hands which way they will, he may give the cuſtody of them to any one, and have them back without hurting the *Duke* or his repreſentative.

Caſe 63. Marryat *verſus* Townly, *June* 27, 1748.

Deviſe to truſtees as ſoon as his three daughters attained their reſpective ages of 21, to convey to them and heirs of their bodies as jointtenants, this not a joint eſtate, but to be conſtrued like jointtenants; conveyance muſt be at 21 reſpectively with croſs remainders.

ELIAS PIERCE made his will *Auguſt* 13th 1724, (i) and deviſed all his real eſtate whatſoever and whereſoever, to truſtees in truſt to receive the rents and profits, and to make or renew leaſes, as occaſion ſhall require, and upon the uſual fines: and as ſoon as his three daughters *Anne*, *Jane* and *Catherine*, attained their reſpective ages of twenty-one, to convey the ſaid real eſtate to them and the heirs of their bodies, and their heirs as jointenants, and to whom he gave and deviſed the ſame accordingly: and for want of ſuch iſſue, to the uſe of his brother *Daniel Pierce* of *Cork* for life; remainder to truſtees and their heirs, during the life of his ſaid brother, to preſerve contingent uſes and remainders; with other remainders over. He directs the reſidue conſiſting of perſonal eſtate, among which he includes the rents and profits of the real eſtate, to be received by the truſtees, to be paid to and among his three daughters equally ſhare and ſhare alike reſpectively, at their reſpective ages of twenty-one or marriage, which ſhall firſt happen.

In a codicil he ſays, that to prevent any diſputes about the ages of his daughters, they were born on ſuch days, as he there mentions, and their ages to be computed from thence.

The youngeſt daughter ſurviving her ſiſters, brought this bill, to have the whole for life.

For plaintiff. *Jointenants* being a proper known word in law, ought to be conſtrued, and a conveyance made accordingly, as far as the law will admit: *i. e.* jointly for their lives with ſeveral inheritances: but this ſeveralty is not from the teſtator's intent, who would have made it joint

(i) Cowper 31, 797.

joint throughout if the law permitted it, but from neceſſity. The expreſs word *jointenants* muſt have its operation, whereas it will be rejected, if they are not conſtrued joint-tenants for life: and it muſt be carried back to the words three *daughters*; for it can have no effect on the word *heirs* generally, *or heirs of their bodies*; and if it had been ſo expreſſed, there would be no doubt. If conſtrued otherwiſe, upon the death of two daughters without iſſue, their ſhares would go over to the remote relations in remainder during (103) the life of the other; to prevent which inconvenience the court often adds words, or changes *or* into *and*. In *Barker* v. *Giles*, 2 *Wms.* there were words both of jointenancy and in common, and the court directed, both ſhould be ſatisfied. In *Tuckerman* v. *Jefferies* the deviſe was of all his eſtate to two nieces *E.* and *J.* to be equally divided between them; and from and after their deceaſe, to the right heirs of *J.* Although the words were ſtrong to make a tenancy in common, *Holt*, *C. J.* held it a joint-tenancy during their lives; becauſe if they ſhould take by moieties, it might happen that the right heir of *J.* ſhould never take the whole: here the conveyance was to be made of the whole and to all the three daughters; for the words import one conveyance: ſo even if they were to take in common, three conveyances would not be neceſſary. In the diſpoſition of the perſonal eſtate the teſtator ſhews he knew how to make uſe of proper words, where he intended a tenancy in common, there being more than two daughters, there would be no croſs remainders: and the teſtator might have intended by this jointenancy to prevent a tenancy by the courteſy.

For defendants, the children of one of the deceaſed daughters, and the huſband and children of the other, it was argued, that the daughters ſhould be tenants for life of their ſhares, and that the heirs of their bodies ſhould not take by limitation but purchaſe, by way of remainder. The words require a conveyance of the legal eſtate to each daughter at twenty-one; otherwiſe the material word *reſpective* muſt be rejected. The law in ſome caſes will admit the tranſpoſition of words; but not to make jointenancies, which are odious in law. Some of the daughters were married in the teſtator's life, and there being a proſpect of their having iſſue, he could not intend the whole ſhould go to the ſurvivor.

LORD

LORD CHANCELLOR.

There is certainly ſome obſcurity in the preſent caſe, ariſing from the inaccurate drawing of the will; the rather becauſe the drawer has uſed ſome legal terms without meaning them in the legal ſenſe. And the court, not being able to give each word its ſtrict legal ſenſe, muſt therefore find out the conſtruction, ſo as to anſwer the reaſonable *intent*, which the teſtator muſt be ſuppoſed to have had, of providing for his daughters and their families. It happens luckily to aſſiſt the court, that the drawer of the will has inſerted directions for the truſtees, to convey; and whenever there are ſuch directions for the truſtees in whom the legal eſtate of the fee veſted, the court has held it in its power to mould it ſo as beſt to anſwer the intent of the teſtator; and not ſo as to fulfil the words of the will; which has been always the rule in marriage articles; and if that was this caſe, there would be no doubt: but even on wills, the court has uſed the ſame latitude, as on Sir
(104) *John Maynard*'s will. Lord *Cowper* took advantage of ſuch a direction, and thereby thought himſelf warranted to inſert truſtees to ſupport the contingent remainders: and this is the ground of diſtinction (if a true one) of ſame words receiving a different conſtruction in caſes executory and executed. As to the intent, the firſt queſtion, in order to determine the ſenſe of the ſubſequent words, is, at what time the conveyance is to be made, whether all at once upon the youngeſt daughter's attaining twenty-one, or ſeverally at their reſpective ages of twenty-one? And I am of opinion, that the intent was, that the truſtees ſhould convey each daughter's particular ſhare to her at twenty-one, and not wait till the youngeſt attained twenty-one. Taking it upon the words, *reſpective* is generally a word of diviſion and diſtribution; for they muſt attain their ages at different times. (k) This would be a proper conſtruction, if it ſtood here; but it is ſtrengthened by the other parts of the will and codicil, as in the diſtribution of his perſonal eſtate, and what he had tranſubſtantiated from his real eſtate; for the conſtruction in both clauſes muſt be the ſame, although he has not repeated the word *reſpective* in the former clauſe: and this is confirmed by the codicil; which, as he poſſibly might know, that the ages of his daughters were not regiſtered, he meant as a declaration of their ages, to ſhew when all the truſts of the will ſhould be performed, and is therefore indicative of his intent. Then the effect this will have upon the ſubſequent

(k) 1 Atk. 579.

ſequent limitations, is, that they muſt be conſtrued conſiſtently therewith, which a joint eſtate is not; for if their titles come at different times, and by different conveyances, they cannot be joint: and it were ſtrange, that the teſtator ſhould mean, that all theſe three ſhares ſhould ſurvive to the youngeſt for life, in prejudice not only of the huſbands of the other daughters, whom he might not regard (though certainly he had ſome view in the marriage to them), but alſo to the prejudice of the iſſue during the life of the aunt. Then the carrying back the word *jointenants* to the daughters is not conſiſtent with the direction to convey reſpectively: nor is there any ground for the conſtruction put on *jointenants* for the defendants; for the want of the words *for life* will prevent the turning it into a remainder, ſo as to take by purchaſe; and it would deſtroy the ſubſequent remainders over. The queſtion then is of the true conſtruction; and I go a middle way, founding myſelf upon this being an executory truſt, with direction to convey; and if there are technical legal words in the will, inconſiſtent with other words in the will, which cannot have their proper effect, I muſt give them their effect, *cy près*, agreeable to the intention of the teſtator, and will conſtrue it like *jointenants*, ſo as to create croſs remainders between them. One great reaſon of inventing croſs remainders is the impoſſibility of the iſſues of different perſons taking as jointenants: it is true, that the law will not admit croſs remainders among more than two; but that is only where it is by implication; (l) for by expreſs words it may be among ſeveral: and the not admitting it by implication at law among more than two, was for a technical reaſon; becauſe the law avoids the ſplitting of tenures. (105) But if I am right, it amounts to an expreſs direction to be like jointenants; and then that difficulty of the law is out of the caſe in a court of equity; which muſt take it as if expreſſed; for *want of iſſue* means want of iſſue of all the daughters, then to go over; not upon the death of one or two without iſſue; which is the conſtruction alſo the law would put upon it, if there had been only two, as in *Holmes* v. *Menil*, *Skin.* and ſeveral other caſes. And this anſwers the meaning of jointenants, as far as poſſible, conſiſtent with the intent; for it is impoſſible he could mean, that they ſhould take ſtrictly as jointenants, having directed reſpective conveyances, but as near jointenants as could be. I ſaid, there would be no doubt, if this was in marriage articles. If therefore articles directed the eſtate to be to the huſband and wife, and the heirs male of their two bodies, then

(l) In Cowper 797. croſs remainders have been admitted between three; and in Doe ex Dim. Burden, v. Burville, Eaſter 13 Geo. 3. B. R.

then to the heirs female, to take as jointenants; the court would have directed it to the father for life, then to the mother for life; and to the daughters as tenants in common, with croſs remainders to themſelves.

The conveyance here muſt be directed at twenty-one reſpectively: then croſs remainders to theſe ſeveral daughters; by which ſurvivorſhip will be preſerved upon the death of any daughter without iſſue: and the moſt that a lay perſon means by *jointenants*, is, that the eſtate ſhould ſurvive.

Caſe 64.

Newland *veſus* Champion, *July* 8, 1748.

Where a creditor may make other perſons, beſide the perſonal repreſentative of the teſtator, parties.

THE widow or repreſentative of *Newland* brought a bill for an account againſt Sir *George Champion*, the ſurviving partner of her huſband. Her brother, who was a creditor of her late huſband for 1000*l.* alſo brought a bill againſt Sir *George Champion* for an account.

Theſe two cauſes were brought on together; and it was inſiſted, that the ſecond bill ought to be diſmiſſed, for it would multiply ſuits, if every creditor might not only bring his bill againſt the perſonal repreſentative of his debtor, but alſo againſt every debtor of that debtor; although under ſpecial circumſtances it might be allowed: as where there is any delay in the repreſentative, or colluſion between the repreſentative and debtor. But here ſeems to be a good underſtanding between the repreſentative and the creditor; and though colluſion is ſuggeſted, it is not proved; and therefore is out of the caſe.

LORD CHANCELLOR.

(106) The general rules are plain, that a creditor of the teſtator or inteſtate need not make any body but the perſonal repreſentative a party. At the ſame time in this court, if there are any perſons who have poſſeſſed the eſtate, or any debtors of the deceaſed, and any colluſion between them and the repreſentative, they may here, though not at law, follow the aſſets and make them parties, and demand an account againſt them: but that is not to be done, unleſs there is ſome proof of colluſion; but I take the caſe of parnerſhip to be different; and though there was no ſuggeſtion of colluſion, yet I do not think the bill would have been demurrable to, as has been inſiſted on. Many bills are brought in this court, not only making the repreſentatives

tives parties, but alſo any other perſons who have poſſeſſed the ſpecific aſſets; and there are many inſtances, where the ſurviving partner, is made party, that they may have an account of the perſonal eſtate entire: and if this bill was diſmiſſed, it would be to ſay, that this creditor for 1000*l.* ſhould not have it in his power to check this account of the perſonal eſtate of his debtor, whoſe effects are in the hands of Sir *George Champion*. So that this is a poſſeſſion of a ſpecific part; therefore though there is no proof of colluſion in this caſe; and the brother of the wife, who is plaintiff in the firſt cauſe, is plaintiff in the ſecond, which might be a preſumption of confidence between them; it is proper, and I ſhall direct an account between the plaintiff in the ſecond cauſe and Sir *George Champion*.

Ex Relatione.

Milner *verſus* Milner, *July* 11, 1748. Caſe 65.

Miſtake in the computation of a legacy rectified according to the intention, though contrary to the words.

SIR *William Milner* bequeaths a legacy in this manner: "I give my daughter *Mary* 3500*l.* which with 6000*l.* ſhe is intitled to by my marriage ſettlement, and 500*l.* from her father-in-law, make up 10,000*l.* which I deſign for her fortune."

It happened that ſhe was intitled only to 5000*l.* by the ſettlement; and now brings a bill to have 4500*l.* raiſed to make it up 10,000*l.*

LORD CHANCELLOR.

There are two queſtions on this bill; firſt, of the meaning of the teſtator? Secondly, of the authorities proper to be cited? As to the firſt his intent appears plainly, and by expreſs words, that ſhe ſhould have 10,000*l.* and that preſently and in principal money. Therefore the objection, that by poſſibility ſhe might have ſo much, avails but little. In the conſtruction of wills, the intent is principally to be regarded; and to anſwer that, a miſtake in the computation ought to be relieved againſt. In caſes of this ſort, the court is not always confined to the order of placing the words in the will; but to make the ſenſe plainer, a change ought to be made: an objection of great weight was, that ſuppoſing the teſtator had given more than was

(m) A ſpecific ſum being given as a reſidue, and being miſcalculated, the real reſidue ſhall paſs, 2 Brown, 18. Poſt. 126.

was ſufficient to make up 10,000*l.* it ſhould not have been abated; and by the ſame reaſon ſhe ſhould only have the expreſs ſum now; which would certainly follow, were that true; but I am of opinion, that in that caſe it ſhould have abated, to anſwer the general intention of giving only 10,000*l.* and for that ſame reaſon ſhall an addition be made in the preſent caſe. Another objection of weight was, that the teſtator had expreſsly given but 3500*l.* which were the only proper legatory words; and ought not to be eraſed to ſubſtitute in their room mere intentional expreſſions, ſuch as in the concluſion. But though it is true, that in ſtrictneſs, the words in the concluſion are not legatory: yet they muſt be complied with, as they diſcover the ultimate end, which the teſtator had in view.

Secondly, in ſupport of this, ſome authorities may be cited. *Swin. part* 7 *cap.* 5. *ſect.* 13. *Errors in Legacies*; that where the meaning of the teſtator is plain, it ſhall prevail againſt the words, although contrary; whether the error in the *quantum* was more or leſs. Of which opinion was *Baldus*, who was an author of much greater weight in the *civil* law than who was of a contrary opinion. To the ſame effect is *Godol. part* 3. *p.* 447. both theſe opinions are founded on the text in the *Digeſt de errore quantitatis legati*; and the comment thereon, and CUJATIUS tom. 2. p. 818. *Socini Concilium* 98, 163. Legacies given as proviſions for children ought to be conſtrued liberally. Theſe authorities ſhew ſtrongly, that the meaning of the teſtator, though contrary to the words, muſt be complied with. Indeed at the time ſome of thoſe books were wrote, the *ſtatute of frauds* had not taken place; and as the law then held, parol evidence might be given in all courts to explain a will, and perhaps ſome contrariety of opinions may have been on this ſubject, where the intention appears on the face of the will, and where not: almoſt all the authorities of the civil law agreeing in the firſt caſe, that the intention ſhall prevail againſt the words: but ſome have thought otherwiſe on the latter caſe, where the intention appeared not on the face of the will, but only by matter *dehors*; although the better opinion even there is, that the intention ſhall prevail: however that difficulty cannot be here, as the intention appears on the face of the will. Upon the whole therefore ſhe is intitled to have the 4500*l.* to make up the 10,000*l.* intended for her fortune.

Arnold

Arnold *verſus* Chapman, *July* 12, 1748. Caſe 66.

THOMAS EMERSON (n) deviſed 100*l.* and all his books to *A.* and *B.* whom he afterwards makes his executors, and a copyhold eſtate to the defendant *Chapman*; he cauſing to be paid to his executors the ſum of 1000*l.* and after payment of debts and legacies, the reſidue and remainder of all his eſtate, freehold, copyhold, leaſehold, plate, rings, ſtock, *&c.* to the governors of the *Foundling Hoſpital*, and their ſucceſſors for ever.

Legacy to *A.* and *B.* they are made executors, and land deviſed to *C.* paying 1000*l.* to executors, the reſidue to a charity.

The executors bring a bill for this 1000*l.* to which there were ſeveral claimants; for beſide the charity, on whoſe behalf it was inſiſted, that the aſſets ſhould be marſhalled, and the debts and legacies charged on the real eſtate, that the perſonal might go clear to the charity, the deviſee of the copyhold inſiſted, that the 100*l.* ſhould not be raiſed at all; for that it was the ſame as if the condition was to pay to the charity; which was an unlawful act that could not take effect, and therefore void, and the eſtate abſolute.

This 1000*l.* is a charge on real eſtate, which by the *mortmain* act is not well diſpoſed, and reſults to the heir.

The next of kin inſiſted, that as by the *ſtatute* of *mortmain* it was void as to the charity, and as the particular deviſee could not take without performing the condition, it ſhould go as part of the teſtator's eſtate undiſpoſed, according to the ſtatute of diſtribution.

For the executors it was ſaid, the deviſe to the charity was in very particular words, which was ſaying, nothing elſe was intended them. The executors took this in their own right, not as executors: in the beginning of the will, he has not named his executors, and therefore does not give them the books and 100*l.* by that name; but when he has once made them executors, he calls them afterward by that name for the ſake of brevity; and it would be hard that the accidental circumſtance of making them executors ſhould induce a different conſtruction.

It was further argued to be a reſulting truſt for the heir at law. Some things may be aſſets in the hands of executors, which yet are not chattels (*Office of executors.*) as lands

(n) Poſt. 322.

lands deviſed to executors in fee to be ſold for payment of debts, are aſſets before the money raiſed, becauſe given to them *eo nomine* as executors, and if they ſhould die, or not prove the will, it would be a truſt in this court; for their refuſing to act could not hurt the creditors. If this was a deviſe to the heir, paying 1000*l.* and the executors enter for breach, they would have had the land, as they would have had the 1000*l.* The plain meaning was, that this ſhould be aſſets for the purpoſes of the will; and where he intends his executors a benefit, he names them; but where they are to take by virtue of their office, he calls
(109) them executors. If then it goes to them as executors, by the ſtatute of *mortmain*, lands cannot be deviſed to be turned into money, and ſo to a charity; becauſe it is an indirect way of doing what the ſtatute has prohibited directly, to prevent a man's diſinheriting his heir in his laſt moments. In the caſe on the will of Sir *John James*, a real eſtate was to be turned into money by a limited time, and then for the benefit of two hoſpitals, which his *lordſhip* held to be within the ſtatute. One deviſed real eſtate for debts, and then the ſurplus of all his eſtate to a papiſt. The queſtion was, Whether the debts might be all turned on the real, ſo that the papiſt ſhould take the perſonal? But Sir *Joſeph Jekyl* would not ſuffer it to be argued: and this is ſtronger than the papiſt act; for that is only a diſability; but this makes the gift entirely void. If the perſonal eſtate is to be exonerated, it muſt be by conſtruction of this court; which will not, unleſs compelled, make a conſtruction to diſinherit an heir at law: nor can the deviſee have it; he is a truſtee for this 1000*l.* and there is no caſe where a charge by way of condition is not conſidered as a truſt in this court. Suppoſe it a deviſe on condition, that he and his heirs paid the annual rents to a charity: that would be a truſt, though by name of a condition, and void and the deviſee could not take.

LORD CHANCELLOR.

There are ſome intricacies in this caſe; but on the whole this 1000*l.* or ſo much as is above debts, ſhall go to that perſon, to whom from the reaſon of the thing and the inclinationof the law it ſhould go.

The firſt queſtion is, in what capacity the executors take: whether for their own benefit, or as executors? For if they take in that capacity, it muſt go for the purpoſes in the will; and I am of that opinion: any other determination

ration would break in on an eſtabliſhed rule, and make a precedent of bad conſequence; by ſaying that when they take barely by the name of executors, they ſhould take for their own uſe. It is true, it may be given for themſelves, as if out of a perſonal eſtate; for then there could be no other intent, but that it ſhould be a deſignation of the perſons to take, whether it was ſpecific or pecuniary; otherwiſe it would be nugatory. In every caſe where real eſtate, or a ſum of money out of it, is given by name of executors, it ſhall be conſidered in that light, and for the purpoſes of the will. So are caſes in *Office of executors*, which are as ſtrong as the preſent; as that the lands of a *villein* are aſſets; ſo was the *villein* himſelf; therefore what comes as accruer from him, muſt be aſſets. Though they had died before, it would have been a good bequeſt of this 1000*l.* on this copyhold for the purpoſes of the will, ſo far as they could take effect, that is for debts and legacies; and if one of them ſhould die, it would ſurvive to the other; and there is no determination to the contrary. It (110) muſt therefore be conſidered ſubject to that duty which is upon them by their office; and it is material, that where he ſpeaks of them with relation to their office, he calls them executors; where he gives to themſelves, he calls them by their own names.

The next queſtion is, to whom it ſhall go? and firſt, whether the law will allow it to go to the charity? The *Foundling Hoſpital* is certainly a good and laudable charity, and ſhould receive all poſſible encouragement; but the rules of law cannot be broke into, and laid down different for that from all the other hoſpitals in the kingdom. Had he deviſed the copyhold eſtate on condition to pay 1000*l.* to the governors, it would have been void by the ſtatute; he has taken another method, by including it in a reſiduary bequeſt of real and perſonal eſtate: and it is ſaid, that they can take, becauſe by giving it to the executors he has made it part of his perſonal eſtate; and he may undoubtedly, if he pleaſes, turn it into perſonal eſtate; but it muſt be for lawful purpoſes. But here the act intervenes; which, if this was allowed, would be eaſily evaded; for it would be only directing the real eſtate to be ſold, and the money to the charity: and in the caſe of *James* this was determined to amount to a deviſe of the land itſelf; becauſe all charges, truſts, ſums of money, &c. deviſed out of land to a charity, are made void by

the act. It is said, (o) the assets should be marshalled; and this case put, that since this act, a man may say he charges his real estate with debts and legacies, and gives his personal estate to a charity: possibly that may do, but it would go a great way toward overturning this act: but as to that I will give no opinion; for there an intention appears in the testator; here no exoneration is intended by the will. As to the rule of the court of marshalling assets, I must take it to be the same, as it was before the statute: and if 1000*l.* was devised, and debts charged on real and personal estate, the rule before the statute was, that the debts should be paid out of the real estate, and the legatees should come on the personal. The court will do the same now: not by way of standing in the place of creditors, but by turning the debts on the real estate. But there is no rule, that where real and personal is charged, and the residue given to a legatee or children, the court would in such case turn the charge on the real, to give the whole personal estate to the legatee. In case of papists, the court would not do for them what it would not do for any one else; and this is a stronger case than that. In *Roper* v. *Ratcliff* it was resolved, that whatever is taken out of the real estate, shall be considered as real; and this would be taking out so much of the real for the charity; which therefore shall not go to it.

Mortmain.

Marshalling of assets.

(111) As to the devisee of the copyhold holding without paying this 1000*l.* it is said to be the same, as if on condition to pay to the charity; and were it so, it would be void; being a condition to do an unlawful act; which the law will prevent. But this is not an unlawful act; not being so strong as if expressed to go to the charity. In regard therefore to him, it is lawful, and he is obliged to pay; and this being a devise to a stranger on condition to pay, at law the heir might enter for breach; but in this court he is to be considered as a trustee. The money then is a charge: and the question is, what is to become of it?

The next of kin cannot have it; because it would be on a principle contrary to their right; for if it is turned into personal, it is given, and must go to the governors; and no part of the personal is undisposed of.

"The

(o) Assets not marshalled to support a Legacy contrary to Law. 3 Vet. 52.

(p) The heir at law then is entitled by way of reſulting truſt; becauſe this 1000*l.* is mentioned by way of condition on the deviſe of the real eſtate, and is to be paid to the executors; and to be ſure if wanted for debts, it would veſt, and muſt be admitted by the executor for that purpoſe only, to be turned into perſonal eſtate. But the act has prevented this tranſmutation for benefit of the hoſpital: and then it remains part of the real, undiſpoſed by the will; for the executors take it only as truſtees: and any part or profits of the real eſtate undiſpoſed, will be a reſulting truſt for the heir: as in the caſe of the Duke of *Beaufort*; where a ſmall part of the profits, a year and a half only, went to the heir, being not given by the will. This deviſe is a ſale in effect to *Chapman* for 1000*l.* and the purchaſe money ariſing from the eſtate muſt go to the perſon intitled to that eſtate. The only remedy the law would give in this caſe, would be to the heir; he might bring his ejectment: and if this truſt is not good, ſhall this court take it out of his hands for the benefit of any one elſe? no; for the heir ſhall have the benefit of any part not well diſpoſed of.

As this charge therefore is well made on the real eſtate, but not well diſpoſed of by reaſon of the act, it muſt be conſidered as between the heir and the hoſpital, as part of the real undiſpoſed, and to be for his benefit.

Elliſon *verſus* Airey, *July* 13, 1748. Caſe 67.

A Woman deviſed to the ſon and two daughters of her nephew *Francis Elliſon*, 10*l.* a piece by name; then deviſes 300*l.* to *Elizabeth Paxton*, to be paid at her age of twenty-one, or marriage; and intereſt in the mean time for her maintenance and education: but if ſhe died before twenty-one or marriage, then to the younger children of her nephew *Francis Elliſon*, equally to be divided to and among them; the ſaid eldeſt ſon being excluded from any part thereof (q).

Deviſe of 300l. to Elizabeth, to be paid at 21 or marriage, but if ſhe died before, then to the younger children of Francis: this extends not to all the younger children, nor to be confined to younger at making the will or death of teſtatrix before 21 or marriage.

(p) Money charged on a real eſtate for a charity ſinks in favour of the ſpecific deviſee, does not go to the heir at law, or reſiduary legatee; 1 Brown, 61.

(q) Supra. 201. 2 Ves. 83. Prec. Chan, 470. 2 Eq. Ab, 264, 331. Gilb. Eq. Rep. 136. 1 Brown 386.

Some of the younger children were born before, ſome after the making of the will; and ſome after the death of the teſtatrix.

It was inſiſted, that this ſhould take in all younger children; for it is not to veſt at the death of the teſtatrix, who therefore could have no view to that. It is ſaid, *excluding* the *eldeſt*; and who will be eldeſt, cannot be known till the death of their father. The teſtatrix knew the eldeſt was otherwiſe provided for, and therefore gives him nothing, which is making a proviſion upon the ſame motives as in a marriage ſettlement: in which *younger children* always mean, *all younger children* which ſhall be born: and had ſhe intended to have excepted any others, ſhe would have excluded them as well as the eldeſt: when ſhe intends thoſe already born any particular benefit, ſhe names them; and by her not naming them in this clauſe, but giving by another deſcription, ſhe could not intend it particularly for them. Wherever there is a proviſion for younger children, *all* are meant; and on that foundation it is, that a poſthumous child ſhall take: for the reaſon of that determination is, that it is a younger child, no matter when born.

For a child born after the date of the will, but before the death of teſtatrix, it was argued, that the teſtatrix intended all younger children capable of taking, at the time the will takes effect. The will does not ſpeak till the death of the teſtatrix; at which time this child falls within the deſcription. In 2 *Ver.* 105. is a caſe in point, that a child born after the making of the will, and before the teſtator's death, ſhould take. They agreed with the defendants in the other point, that children afterward born ſhould not take. 2 *Ver.* 545. (r) a deviſe of perſonal eſtate to a man and his children: a child born after the teſtator's death ſhall not take; becauſe it veſted on his death, and ſhall not be deveſted. In *Web* v. *Web*, *Hill.* 1735, there was a deviſe of the reſidue of perſonal eſtate to the teſtator's brother *H.* and all his children, to be divided amongſt them ſhare and ſhare alike: *H.* had ſeveral children, the teſtator dies; and ſix months afterward another child is born: Lord *Talbot* held, that this child could not take; which caſe was ſtronger than the preſent, there being the word *all*. In *Hale* v. *Hale*, 6 *G.* 2. was a deviſe of 2000*l.* to all the children of my nephew *J. Hale*, who ſhall be living at the death of *Amy*; and afterward a deviſe of the moiety

(r) 2 Vern. 710.

moiety of the reſidue of the perſonal eſtate to all the children of *J. Hale*, payable at twenty-one or marriage. The queſtion was, whether children born after the death of the teſtator could take? And the court was of opinion, that as to the 2000*l.* they ſhould, if born before the death of *Amy*, upon the particular words of the will: but as to the reſidue, thoſe only who were living at the death of the teſtatrix ſhould take. In *Heath* v. *Heath*, *Feb.* 11th 1740, before *Lord Chief Baron Parker*, ſitting for *Lord Chancellor*, there was a deviſe of copyhold to truſtees, to ſell for (113) payment of debts, and the reſt of the money and perſonal eſtate among all the children of her brother and ſiſter *Heath*, reſpectively, male as well as female, in equal proportions: they had only four children at the time of making the will; and after the death of the teſtatrix, another was born. The court was of opinion that the child born afterward could not take. The preſent caſe differs from thoſe of marriage ſettlements; for then there are no children, and conſequently there muſt be ſomething future to anſwer the deſcription; and from the nature of the contract, the ſame motive going through, and the ſame perſons in contemplation, it muſt include all.

For defendants who were born before the making the will, was further cited 1 *Wms.* 342. that a deviſe to children and grand-children ſhould refer to ſuch only, as were born at the time of making the will; and the difference taken in *Wild*'s caſe, 6 *Co.* 16. that a deviſe to one and his children, if the children are not in *eſſe*, ſhall be taken as words of limitation; which goes on this foundation, that children not in *eſſe* ſhould not take, unleſs deviſed by words that relate to futurity; and the general rule of law is, that the perſon to whom the gift is made, muſt be in *eſſe*, unleſs an intention appears to the contrary. There is no neceſſity for preſuming ſuch intention here; for there were perſons in *eſſe* to ſatisfy the words of the will; which words are the ſame thing, as if the children were particularly named; for a deſcription is ſufficient. There is nothing here to ſhew an intention to take in future perſons, or to take this out of the rules of law, which were formerly ſo ſtrict as not to allow a poſthumous child to take at all. The words *younger children* are only an excluſion of the eldeſt, and therefore mentioned here, and not in the other clauſe where he was included. Beſide, it is common in wills to make uſe of different words for the ſame thing: although the will has its operation from the death of the teſtatrix, yet the intention ſhall be collected from the circumſtances

cumſtances at the time of making the will; and here ſhe is to be preſumed to have an affection for the children in *eſſe* at the time of giving them this legacy, which is intended as a proviſion for them; and which cannot be, if this conſtruction prevails; for then there muſt be an impoſſibility of payment to any one of them, till the death of the father; for not till then would it be known who were to take. And by extending this to the children born after making of the will, or death of the teſtatrix, it will be more probable, that the father for whom no bounty was intended, might poſſeſs part of this legacy as repreſentative to one of his children, who lived but one month.

(114) LORD CHANCELLOR.

No certain rule can be laid down in caſes of this kind; they muſt be various, as very few words will vary the evidence of the teſtator's intention, and conſequently the meaning of the will: but there are general principles, which are theſe. The court generally takes it, that there ought to be a legatee in being; and therefore will not conſtrue a will to extend to perſons not in being, unleſs the teſtator ſhews his intention to be ſuch, by words in the will; which is the rule at common law as to contingent deviſes and remainders; for they * never conſtrue them contingent or executory unleſs compelled: nor will they adjudge lands to go to an infant in *ventre ſa mere*, unleſs appearing to be ſo intended from the words of the will; always avoiding it unleſs there is a clear intention to the contrary, and this is to avoid ſuſpending; which always tends to make property uncertain, and to the inconvenience of making more diviſions than the teſtator meant. Therefore

* A truſt term to raiſe a ſum for ſuch child or children as ſhould be living at A's. death, as poſthumous child held to take within the meaning of the truſt, which ought not to be conſtrued ſo ſtrict as a limitation at law: Prec. Chan. 50, 1 Wms. 246, 486. 340, 2 Wms. 446. 2 Atk. 117. 3 Atk. 203. 1 Ves. 85. Barnard 272. all theſe caſes are in favour of the poſthumous child, but in 1 Wms. 342. on a deviſe to children and grand children, a grand child in ventre ſa mere at teſtator's death was held not to take, as ſuch a deviſe refers only to ſuch as were living at the making the will, ſeems if the deviſe had been to ſuch as were living at teſtator's death, & Vide 2 Brown 47. where Sir Lloyd Kenyon ruled, from Lord Hardwicke's reaſoning in this caſe, that the deſcription *of children of A.* does not extend to a child in ventre ſa mere, the child not being in eſſe at the time, and therefore incapable of taking; which he recogniſed afterwards in 2 Brown, 63. where he held that a child in ventre ſa mere, ſhall not take under a bequeſt to the *children of A. living at the death of Teſtator*: In 1 Brown 386. an after born child was let in to take a veſted legacy: ante. 86.

Therefore when there is a deviſe to children, if it was to be ſuſpended till the death of the father, it might be little beneficial to any of them; and where they are made tenants in common, and conſequently no ſurvivorſhip between them, the court would avoid its going over upon the death of any of the children to the father; for whom the bounty was not intended (r). And although this cannot be avoided in ſome caſes; yet the extending it further, by allowing it to go to children after born, would make it more probable, that the father might take, as repreſenting ſome of his children. Theſe are the general reaſons, which the court has gone upon; and I do not know, but ſeveral of the reſolutions on this head might be contrary to the real intention of the teſtator; and that for the ſake of convenience. There is a great difference between ſuch deviſes as this and proviſions by marriage ſettlement; for as before marriage there are no children, to whom it can be applied, it muſt mean all: and there is no place to draw the line in; nor any reaſon why it ſhould be for one more than another: it is a parental proviſion made as a debt of nature, and therefore all are intitled. Theſe are the general rules; but this is a middle caſe, depending on the particular penning of the bequeſt. It is ſaid, the word *younger* muſt be reſtrained to the time of making the will; others ſay, to the death of the teſtatrix; others to the death of *Elizabeth* under age and before marriage; and others, that it ſhould go to all younger children. To confine it to the time of making, it is ſaid, that ſhe had taken notice of, and given by name to, the children then in *eſſe*; who are therefore to be conſidered as the objects of her bounty; but I think, it rather holds the contrary way; for where ſhe intends their particular benefit, ſhe names them; when not, ſhe uſes the general words *younger children*. As to her intending it to all the younger children, there may be a caſe of that kind, but it would be liable to all the inconveniences, which this court has endeavoured to avoid. I am of opinion, that it means ſuch as ſhould be younger children at the death of *Elizabeth* before twenty-one or marriage: it is a contingent legacy, and there is no reaſon to confine it to the time of making the will, or the death of the teſtatrix; for neither was the time, upon which the legacy was to veſt; and therefore as the whole is ſuſpended till the death of *Elizabeth*, there is no inconvenience

(115)

(r) Where an eſtate is left on a contingency to the iſſue of any one, all born before the contingency happens, ſhall take, none born after. Cowper, 309. where Lord Mansfield ſays the doctrine in this caſe is laid down by Lord Hardwicke, vide 2 Atkins, 121. 2 Ch. Rep. 69. 9 Mod. 104.

venience to wait till then. When is this legacy given? at the death of *Elizabeth* before twenty-one or marriage. What is to be done with it? to be divided equally. When? that is not ſpecified: but the natural way of thinking is, that ſhe intended it ſhould be divided when it veſts; and there is a ſtronger reaſon to think, ſhe meant ſo; for ſhe has directed, where the intereſt ſhould go, during the life of *Elizabeth*, but after her death before twenty-one or marriage, there is no direction about the intereſt; which is evidence, that ſhe intended it to be actually divided at that time; and if it be divided, it muſt be veſted. This conſtruction anſwers the words of the will and the intention, avoids all inconveniences, fixes a proper period, and anſwers, what negatively appears to be the intention of the teſtatrix, by her not applying the intereſt after that period: and alſo finds out, who is the eldeſt, *viz.* ſuch as ſhould be ſo at the death of *Elizabeth* before twenty-one or marriage.

There was a direction, that the truſtees of the will ſhould be paid for their trouble as well as expence: and it was objected, that this might be of general prejudice; becauſe truſtees frequently draw wills and ſettlements themſelves.

Allowance to truſtees for their trouble.

But *Lord Chancellor* ſaid, this was a legacy to the truſtees; to whom the teſtator may give this ſatisfaction, if he pleaſes. And in *Serjeant Hall*'s will, *Sir Richard Hopkin*'s, and in the caſe of the *Ducheſs* of *Marlborough*, there was a great allowance made for their trouble; and no inconvenience, becauſe it can carry it no further, than where there are particular directions. Let the *maſter* therefore inquire, what they might reaſonably deſerve for their trouble.

Caſe 68. Stockwell *verſus* Terry, *July* 1748.

By 2 E. 6. 13. land in its own nature not fit for tillage, pays no tithe for ſeven years after improved: but if not fit for tillage by reaſon of woods, &c. pays tithe preſently after improvement.

THE bill was by a rector for payment of tithes in kind of 300 acres of land.

Two bars were ſet up, the firſt general to all acres; the ſtatute 2 *E.* 6. 13. by which waſte ground, improved into arable or meadow, ſhall not pay tithes, till ſeven years after

ter the improvement is completed; as to which the caſe appeared, that the land in queſtion was a common field for ſheep, horſes, and cows, but not fit for fattening them, being over-run with bruſhwood, briars, and other weeds; the parſon was intitled to tithes of calves, milk, wool, *&c.* out of it, and it was proved to be worth two ſhillings *per* acre, before it was improved. (116)

The ſecond was particular to forty-eight acres, parcel thereof; as to which an agreement had been entered into between the defendant and the parſon, and thoſe who had right to feed in the common, for the making an incloſure; and an act of parliament was paſſed for that purpoſe, by which they enjoy all their rights in ſeveralty, as they did their rights of common before. Theſe forty-eight acres were allotted to the defendant, in lieu of his common; and the queſtion was, whether this was ſtill covered by a *modus*, which had been paid for it before?

For plaintiff. This land was not within the ſtatute; for it muſt be *naturâ ſuâ ſterilis*, 2 *Inſt.* 656. and the caſes there put, which are much ſtronger than the preſent. *Cr. E.* 475. 1 *Rol. R.* 354. 2 *Bul.* 163. and 6 *Mod.* 96. ſhew that the ſtatute intends only ſuch lands as were merely barren, and made good by induſtry; and if it yielded any profit before, as wood, *&c.* it is not within it. This ground yielded profit before, and cattle were kept on it; which could not be if it was waſte.

As to the *modus*: Theſe forty-eight acres are of another nature, and not to be covered by it: if there is a *modus* for any thing, and a new part is joined to it, that addition muſt be paid for: as if a *modus* for two mills, and a third is added, the *modus* will not cover it: ſo if for a garden, and any addition is made to it; if a buck and doe are paid for a park: if diſparked, tithes muſt be paid for it.

For defendant. This act was made to encourage agriculture, by the not loſing a tenth of the improvement: although the land yields ſome fruit, yet if barren *quod agriculturam*, it is within the ſtatute; which muſt mean ſuch lands, as are not fit for agriculture without conſiderable expence; as a recompence for which this encouragement is given. Defendant has been at great expence in clearing and improving this ground, and will not have the benefit of it, if to pay tithes the firſt ſeven years.

As

As to the agreement, the general view of it and of the act of parliament was, that none ſhould be prejudiced; and that it ſhould be exactly in the ſame ſituation as before, except that it ſhould not be in common. But the conſtruction contended for, will give the parſon, whoſe former right was preſerved, what he had not before.

(117) LORD CHANCELLOR.

If there had been a ſuit in the eccleſiaſtical court; and defendant pleaded the ſtatute, as here; and the plaintiff denied, that this was within it; there muſt by the nature of their juriſdiction have been a prohibition for want of a trial; and it would be afterward tried. But this court is not ſo bound; it is to judge of fact, as well as law: otherwiſe every *modus* muſt be ſent to trial: but there are many decrees here, and alſo in the *Exchequer*, for payment of tithes for want of proof of a *modus*; for ſomething ſhall be laid to induce a doubt: otherwiſe it would be putting the parties to unreaſonable expence. In this caſe a ſound diſcretion ſhould be uſed; for by too ſtrict a conſtruction, the court might bring a burthen upon the party improving, which would alſo tend to impoveriſh the church; for by theſe improvements, livings are made better: and though the preſent incumbent were not capable of tithes for ſeven years, yet after that the profit will be increaſed. On the other hand, it will greatly prejudice the incumbent, to call land to ſome degree fertile, barren land; for he will thereby be deprived of his tithes. I muſt be guided by the determinations made on the act, all which have been agreeable to Lord *Coke*'s *comment* 2 *Inſt.* 655. where the rule laid down is, if land is in its own nature ſo barren as not to be proper for agriculture, after it is improved, it ſhall not pay tithe: but if in its own nature it is fit for tillage, but by reaſon of wood or other accidental circumſtance it was not turned into tillage before; upon the taking away that accidental circumſtance, it ſhall pay tithes preſently on being turned to tillage: for the act does not conſider the expence, but that you may by poſſibility be paid, as by the timber, underwood, *&c.* But if afterward this land will not produce unleſs dunged or chalked, the court has conſidered this as evidence of its being barren in its own nature, not proper for corn without additional improvement. It is admitted that this land produced three crops of corn, without any thing but ploughing; but objected that chalking will be neceſſary; and ſo it may in the courſe of common huſbandry. But the queſtion is, what was neceſſary for

for the firſt crop? The way of arguing for defendant would throw the expence upon the firſt ſeven years; whereas the benefit is to continue for ever. There is an expence in gaining land from the ſea: yet no ſeven years allowed, though overflown time out of mind; becauſe the benefit is laſting: but if an additional expence is neceſſary to make it produce the firſt crop, ſeven years ſhall be allowed: it is admitted, that this land is not barren; and there is much land which can neither be called fruitful or barren, that pays tithe.

As to the forty-eight acres, I am of opinion, that in this caſe they are covered by the *modus*. I admit the caſe mentioned; and that by diſparking the *modus* is gone; and if the owner diſparks part, he ſhall pay the ſame *modus*, and alſo tithes in kind for what is diſparked; becauſe it was paid in nature of a franchiſe, and not for lands. But ſuppoſe the owner with conſent of the parſon diſparks ſome to be enjoyed as before: I ſhould think, it was the incumbent's intent, that it ſhould be ſtill enjoyed as part of the park, and no tithes in kind ſhould be paid for it; for otherwiſe the agreement with the parſon would be uſeleſs. So if this agreement had been between a lord of the manor and the other commoners without the parſon, and they had turned it into ſeveral ownerſhips, it would be liable to the right of tithes, which the rector has over the whole pariſh. But here has been an agreement by act of parliament, to which the parſon was party; and although the recital uſes only general words, yet it ſhews plainly the intention of the parties to be, that every perſon ſhould enjoy his allotment in the ſame manner as he did the thing in lieu; and that was ſubject to the *modus*.

Common incloſed by agreement covered by former *modus*.

Let the bill therefore be diſmiſſed as to the forty-eight acres, and as to the reſt, an account be taken of the ſeveral tithes to be paid; and the plaintiff, except as to the proof of the *modus*, have his coſts: for I never knew a decree for an account of tithes without coſts, unleſs there was a tender.

Ex Relatione.

Fonnereau

Case 69. Fonnereau *verſus* Fonnereau, *Auguſt* 5, 1748.

Legacy when he ſhall attain 25. intereſt in mean time, and part of the principal to place him out; veſted and tranſmiſſible though he dies before 25.

A. Made his will thus: (s) "I give my grandſon *Claudius Fonnereau*, when he ſhall attain twenty-five, 1000*l.* which I impower my executors to lay out in ſuch ſecurities, as they ſhall think fit; and the (t) intereſt and income thereof to be for and towards his education as they ſhall think fit; and alſo part of the principal to put him out apprentice; the remainder to be paid him when he ſhall attain twenty-five, and not before."

He died before twenty-five, and his father as adminiſtrator to him, claimed this 1000*l.* as being a veſted legacy and tranſmiſſible to his repreſentative.

Againſt which it was inſiſted, that it lapſed and fell into the reſidue; and the diſtinction taken where the time is annexed to the gift, where to the payment. That here it was clearly upon the firſt part of the deviſe ſo annexed to the gift, as not to be ſeparated, being no gift without it: nor does the following part ſhew a different intent; for as to the placing out, *&c.* it is only to take care, that it carries intereſt for ſomebody; ſtill depending upon the queſtion who ſhall be intitled. The direction of the intereſt for his education makes rather againſt this claim, as being (119) for the particular and perſonal uſe of the legatee, not for his repreſentative: but at leaſt he is not intitled at preſent according to *Laundy* v. *Williams*.

Lord Chancellor.

The general queſtion depends upon the conſtruction of the whole of the clauſe taken together; and this is a very ſtrong caſe, to make it veſted and tranſmiſſible, notwithſtanding the dying before twenty-five; which time was not inſerted to poſtpone the veſting the legacy, but the payment. It is true the general diſtinction, though often ſaid to be a refined one, is eſtabliſhed, *viz.* that a legacy given barely at twenty-five is in general not veſted, the time being annexed to the ſubſtance; but if it be at twenty-five,

(s) 3 Atk. 645, S. C.

(t) In legatory caſes, intereſt is evidence of veſting. 2 Vol. 263, and the caſes there cited.

twenty-five, (u) it is veſted, being annexed to the execution and performance. But caſes upon particular circumſtances are taken out of this; (x) as where intereſt is given in the mean time, it veſts the property of the principal, as the ſhadow follows the body; unleſs there is ſomething elſe to take off the force of that conſequence: and this caſe is ſtronger than that, or than moſt of thoſe caſes; there being a direction to diſpoſe of part to put him apprentice; to which a court of equity would compel the executors, it being obligatory on them; and their diſcretionary power only as to the ſecurities: its being for his perſonal benefit makes no difference; the teſtator conſidered him as a minor, and therefore that this was moſt beneficial for his intereſt: the executors might have taken the greater part, almoſt to the extent of the whole, to place him out; which ſhews, it ariſes from his property. In the caſe of the *Attorney General* v. *Hall*, the court ſaid, it was not a bare power to diſpoſe, for he might have diſpoſed of the whole: and here is a direction very near to the whole of the principal; which can ariſe only from his having the property: it was only intended to poſtpone the perſonal payment of any thing to himſelf, becauſe of his incapacity. Upon the whole therefore this was veſted; and muſt be *now* given to his repreſentative; for where intereſt is given, which is given for delay of payment, the *Eccleſiaſtical* court decrees payment immediately; but if no intereſt be given, it ſuſpends the time of payment, till he would have attained that age.

Barneſly *verſus* Powel, *Auguſt* 5, 1748. Caſe 70.

THE bill ſought to be relieved againſt a paper writing of the 16th *October*, 1736, purporting to be the will of plaintiff's father, under which the defendant *Manſel Powel* claimed, and which was not without evidence to ſupport it; although there was ſtrong ſuſpicion of forgery. It was alſo to be relieved againſt ſeveral acts of the plaintiff ſince his father's death; ſuch as a decree of the court of *Exchequer* againſt him, and a ſentence in the *Prerogative* court, wherein the plaintiff's conſent to eſtabliſh that will by a *probate* was obtained, and conveyances and aſſurances made by him. Poſt. 281.

LORD

(u) 1 Brown, 195. ante. 59. (x) 1 Vern. 462. 2 Vern. 673. Pre. ch. 318. 1 Atk. 501, 512. this is only in Legatory caſes, 2 Vol. 263. 2 Vent. 342. 1 Brown 191, 268.

LORD CHANCELLOR.

I am unwilling to declare my opinion, for fear of ſome new contrivance. Undoubtedly the whole will turn upon the reality or fairneſs of the will; for if forged, it explains every tranſaction in the caſe; giving credit to all the evidence on the part of the plaintiff; ſhewing combination, *&c.* and all this management to be an impoſition upon him. (y) It is unfit for a court of equity to determine a queſtion of forgery by their own determination of the fact, unleſs where it is very plain, and no evidence to ſupport it; which I cannot ſay there is not here, ſo as to ſet it aſide. The only thing I have conſidered, is, to come at the trial clearly, ſo as the plaintiff may not be intangled by his acts: and there is enough in the caſe to ſet aſide every thing of that ſort at the trial, and prevent its being made uſe of; there being a great deal of management, which ought to be diſcountenanced. If in a doubtful caſe, both parties come to an agreement, prejudice to one ſide is not a ground for a court of equity to ſet it aſide: but if forgery appears, there is no real conſideration upon the merits: then none of theſe facts ſhall be given in evidence at the trial to ſupport the will. The conſequence is another conſideration, which will ariſe properly afterwards. (z)

Relief may be againſt a decree obtained by fraud.

There are ſeveral inſtances of relief, notwithſtanding a former decree, if obtained by fraud and impoſition, which infects judgments at law, and decrees of all courts; and annuls the whole in the conſideration of this court: as held by Lord *Macclesfield* in *Richmond* v. *Taylour*. As to the ſentence of the *prerogative* court, as at preſent adviſed, that will create no difficulty, if the will is found forged; for then the plaintiff's conſent appearing to have been obtained by the miſrepreſentation of that forged will, that fraud infects the ſentence; againſt which, the relief muſt be here: this is not abſolute; but only to ſhew the tendency of my opinion upon the equity reſerved after the trial; for I ſhould not ſcruple decreeing the defendant, who obtained that *probate*, to ſtand as a truſtee in reſpect of the *probate*; which would not overturn the juriſdiction of that court.

Againſt a probate obtained by fraud, relief muſt be here, where the party will be decreed a truſtee.

The iſſue was directed accordingly; with a ſpecial direction in the decretal order, to know upon what foundation the jury went, if they found againſt the will; whether

(y) 1 Wms. 388. 2 Atk. 324. (z) Poſt. 288.

ther upon forgery or any particular defect in the execution.

Allen *verſus* Poulton, *October* 25, 1748.

Caſe 71.

Sir *William Forteſcue*, Maſter of the *Rolls*.

BLACKBOURN POULTON deviſed to the plaintiff, his grandſon by a daughter, the ſeveral copyhold eſtates by him held of the manor of *Barking*, to hold to him, his heirs and aſſigns for ever. He had two copyhold eſtates held of that manor, neither of which were ſurrendered to the uſe of his will; and in one of them only a truſt eſtate, it being taken in the name of a younger ſon ſince dead: but a declaration was indorſed thereon, that it was for the benefit of the father; yet it ſtill continued in the truſtees. He had other copyholds, which he had ſurrendered to the uſe of the will, and he had deviſed ſeveral legacies to the defendant, his eldeſt ſon.

Truſt copyhold may be deviſed without a ſurrender to uſe of the will.

The bill was to have the poſſeſſion of theſe two copyhold eſtates.

Againſt which it was objected for the defendant, that they paſs not by the deviſe, becauſe there was no ſurrender; nor was it intended to paſs them: they deſcended therefore to the heir at law, in whoſe favour the balance always turns in doubtful caſes. (b) Allowing that in general a truſt copyhold may be deviſed, though not ſurrendered, yet it muſt be by particular words, ſhewing ſuch intent: whereas here, a manifeſt difference was intended between theſe and his other copyholds, which he had ſurrendered; and as to one of them, it did not come within the words; which are only applicable to thoſe copyholds, of which he had the legal eſtate, and which he himſelf held of the manor; whereas here the truſtees were tenants. In the caſe of the *King's Head Inn* in *Turnham Green*, *Banks* v. *Denſhire*, which was a copyhold houſe, three parts in one manor, and one in another, the teſtator deviſed all his copyhold eſtate, which he had ſurrendered to the uſe of his

Ante, 63.

(a) Poſt. 189. 3 Wms. 360. 2 Vern. 680. 1 Atk. 390. 2 Atk. 37. Barnard 9. 3 Atk. 75.

(b) It will paſs by a will without any witneſs, the eſtate paſſing by the ſurrender, of which the will only directed the uſes. Poſt. 225.

his will, having ſurrendered only that which was in one of the manors: and *Lord Chancellor* held, that only ſhould paſs.

As to the other copyhold, the defect of ſurrender ſhould never be ſupplied in favour of a grandchild. *Kettle* v. *Townſend*, *Sal.* 184.

Maſter of the *Rolls*.

As to one of theſe copyholds, the objection of no ſurrender is of no weight; (c) becauſe having only an equitable intereſt therein, he might by the conſtant rule of this court diſpoſe of the truſt without a ſurrender: it is true, (122) that an intent to paſs it muſt appear; but the words are very extenſive, and mean *all* the copyhold held of the manor: and though in ſtrictneſs of law it is not held by him, but by the truſtee, who is tenant; yet, I think, it would be going too far to admit ſuch a diſtinction here; eſpecially in the conſtruction of a will, although it has been alledged, that the teſtator was very converſant in making wills; for in common parlance a man might think, what was held by his truſtee, was held by him: and the reaſon of not ſurrendering might be becauſe he knew, there was no occaſion for it: as the law is ſo, of which every one is ſuppoſed conuſant. In the caſe of the *King's Head* the words are more particular, being a deviſe of his copyhold lands, which he had ſurrendered: and then the court could not take in lands not ſurrendered.

Claimant under will muſt admit the whole.

The other (d) copyhold ſtands on a different reaſon, not being a truſt; and therefore a ſurrender in ſtrictneſs of law is neceſſary to make it paſs: but if the intent was to paſs it, a perſon claiming under a will muſt admit the whole; and the intent is ſo; being within the general words *held of the manor*. Nor is the objection of his having ſurrendered other copyholds, and that therefore the intent was different as to this, ſufficient to take it out of the deviſe: and perhaps the intent was to leave it to the option of the defendant, to forfeit his claims by the will in diſputing this. Therefore they both paſs.

Hill

(c) Equity of redemption in copyholds paſſes by will without ſurrender, 3 Brown, 482.

(d) 3 Brown, 64. S. P.

Hill *verſus* Caillovel, *October* 26, 1748. Caſe 72.

THOMAS HILL at the age of twenty-four in 1720 entered into a bond to *Iſaac Caillovel* for the payment of 320*l.* within ſix months after his father's death, if he ſurvived him: if not, to be void; the father being then ſeventy.

Bond by *A.* in 1720 for payment in 6 months after his father's death, if he ſurvived, otherwiſe to be void: the father then 70, and dies in 1731, *A.* in 1734: no relief except againſt the penalty; no proof of impoſition although ſuſpicious circumſtances in it.

The obligee died in 1720, his executor in 1722 aſſigned it for valuable conſideration, for aught that appeared to the contrary, to *Lane*: the father died in 1731, after his death and the death of *Lane*, letters were wrote to the ſon, demanding it; who did not deny his entering into it, but diſputed his knowing any thing of the executor of *Lane*. No action was brought thereon in the life of the ſon who died in 1734, but afterward application was made to his widow and executrix: and a compoſition offered, with which ſhe did not comply. An action was brought; and verdict and judgment followed thereon; but before judgment the executrix brought this bill for relief, againſt the repreſentative at a fourth hand of the obligee, and againſt the executor of *Lane*, as being obtained from an extravagant young heir, neceſſitous, and dependent upon his father; and an extraordinary loan under oppreſſive and hard circumſtances. Nor could the aſſignment alter it; or put the aſſignee in a better caſe than the obligee himſelf; for he muſt take it ſubject to all the equity upon it. (123)

LORD CHANCELLOR.

A very ſtrong caſe for the defendant; it is true, that the rule of the court is, that on a bond from a young heir in life of his father, being extravagant, *&c.* the court will hold the creditor to ſtrict proof, and either relieve againſt, or reduce it to the ſum, that was advanced; and had this queſtion ariſen recently between the original creditor and debtor, and a bill brought for relief, that appearance in the condition of the bond would have made me expect an account from the defendant upon what conſideration it roſe. Although it is not to be laid down in general, that where a bill is brought for relief againſt a bond, the plain-

tiff ſhall be relieved, unleſs there is actual proof of the payment of the money; for that would make bonds uſeleſs. Then as to the circumſtances here, it induces ſuſpicion; but that cannot be certain; for out of humanity and tenderneſs ſuch a ſum might be advanced. Can I relieve without proof of impoſition? Why did not the ſon bring a bill for relief in his life upon the demand againſt him? For it is not prudent to wait, till the action is brought. This is a ſtrong caſe even for *Caillovel*; but in the caſe of the aſſignee for valuable conſideration it is ſtronger. The rule is right, that whatever takes the aſſignment of a bond, being a *choſe in action*, takes it ſubject to all the equity in the hands of the original obligee: but length of time and circumſtances may vary that, and make the caſe of the aſſignee ſtronger; for why was not the bill brought, when the facts were recent? (e) The only relief is againſt the penalty; to which every obligor coming into this court is intitled. Had the defendant proved leſs, conſidering how little the plaintiff has proved, I ſhould be ſtill of the ſame opinion.

Aſſignee of bond takes it ſubject to all equity; but time, &c. may vary it.

Caſe 73. Reech *verſus* Kennegal, *October* 26, 1748.

KENNEGAL, having made his will, depoſited it in the hands of one of his nephews, whom he made executor and reſiduary legatee, with a manifeſt intention of reconſidering it; which he afterward does in the preſence of the miniſter of the pariſh. *Wm.* another nephew, being then there, mentions his intending to leave him 100*l.* which the teſtator allows, and deſires the other (his executor) to pay it: who undertakes it, ſaying there would be no occaſion to alter the will for that purpoſe, for that he would pay it, and give his bond or note, if inſiſted upon. But the teſtator is ſatisfied without that, and dies the next day; and three months after the teſtator's death, the executor upon an occaſional converſation with ſtrangers promiſes to pay.

Executor and reſiduary legatee undertakes to pay a legacy not in the will; he ſhall be bound thereto, not perſonally, but out of the reſidue of the aſſets.

(124) Againſt him was the preſent bill brought by the executors of *Wm.* for that 100*l.* upon the foot of his undertaking to pay it, and by that engagement preventing the alteration of the will by fraud: for which was cited *Thyn.* v. *Thyn.*

(e) Bond given for the enjoyment of a collateral matter, an injunction againſt an action at law for the penalty will be granted, and an iſſue quantum damnificatus will be awarded; the enjoyment of the object being the principal intent of the deed, and the penalty only acceſſional to ſecure the real damage. 1 Brown, 418.

Thyn. 1 *Ver.* 296, and *Oldham* v. *Litchfield*, 2 *Ver.* 506. praying an immediate decree againſt the defendant perſonally, upon his undertaking and promiſe after the teſtator's death; inſiſting alſo that a debt due from the teſtator ſhould not be deducted out of the 100*l.* by way of implied ſatisfaction; for ſuch implication is always liable to be rebutted by evidence, and here it appeared to be intended as a bounty, although not ſaid ſo.

For defendant: This is in ſubſtance deſiring the court to inſert a legacy, which is not in the will, on the foundation of *parol* evidence only. If it is a fraud indeed, it is to be relieved againſt; but there is none here: and ſo, different from *Thyn* v. *Thyn*, where there was certainly fraud by miſrepreſentation of the fact. But here it did not ariſe originally from the defendant; it amounts at moſt but to breach of promiſe, and *valeat* at law *quantum valere poteſt*, and not in a court of equity on the foot of fraud; as in the caſe of *Whitton* v. *Ruſſel*, *July* 28, 1739, which was a deviſe of a leaſehold intereſt to three perſons, ſubject to an annuity of 20*l.* *per ann.* to the plaintiff: the teſtator having afterward a mind to charge the eſtate with a farther annuity of 15*l.* *per ann.* for the plaintiff, a conſultation was had how to do it: in which *H.* one of the three was preſent: and it was adviſed to take a bond from the three deviſees for payment thereof, inſtead of adding a codicil; to which *H.* agreed: but before the bond was prepared, the teſtator died. This not appearing on the face of the will was not paid; but ten years afterward, a bill was brought againſt *H.* The queſtion aroſe on the conſequence of the fact, whether it was proper for a court of equity to interpoſe? One circumſtance againſt it was the length of time; but the principal, that this was breaking in upon the ſtatute of frauds: and *Thyn* v. *Thyn* was there cited. His *Lordſhip* held it a caſe of a very delicate nature, and ought to be very ſtrong for relief: that there were ſeveral caſes, in which the court would wiſh to relieve, but by their rules could not; but that every breach of promiſe is not a fraud to induce a court of equity thereto; and would give no relief. If it is a promiſe, why not try it at law? and not come into a court of equity, which holds not juriſdiction of *Aſſumpſit*; for if good, it is good on ſome conſideration, upon which the law would ſupport it. This is to ſet up a legacy, not proved in the *Eccleſiaſtical* court; and by encouraging perjury will overturn the ſtatute intended to prevent it: but if there were any foundation for this court to interpoſe, it muſt be only out of aſſets: otherwiſe it would

(125) put the plaintiff in a better caſe than legatees, and the defendant in a worſe by being bound to pay, if aſſets are deficient: and if this is in nature of a legacy, the debt muſt be deducted; the court always conſidering it a ſatisfaction, where a legacy is larger than the debt.

LORD CHANCELLOR.

This is a very ſtrong caſe to give the plaintiff relief, the rule of law and of this court, ſtrengthened by the authority of the ſtatute is, that all the legacies, unleſs in the caſe of nuncupative wills, muſt be in writing, and wrote in the will. Then all the rules and arguments laid down for the defendant againſt breaking in upon the will by parol proof, are true. But notwithſtanding this the court has already adhered to this principle, that the ſtatute ſhould never be underſtood to protect fraud; and therefore whenever a caſe is infected with fraud, ſuch as the *Eccleſiaſtical* court cannot relieve againſt (for they may relieve againſt fraud in obtaining a will) the court will not ſuffer the ſtatute to protect it, ſo as that any one ſhould run away with a benefit not intended. The queſtion then is, whether this is a caſe of fraud, ſtrengthened by the promiſe of the defendant? and I am of opinion, that it is. It has been taken, as if the fraud muſt be on the perſon, who might have remedy at law; but this court conſiders it as a fraud alſo upon the teſtator; for whom none can have remedy but a perſon coming here for payment: and here it is plain, and admitted in all the circumſtances by the defendant, except juſt ſo much as he thought, would intitle to a decree againſt him. But when ſo far as admitted, it gives credit to the witneſs, who goes farther; this therefore is not to be compared to the caſe where there was but one witneſs againſt the defendant's anſwer; (f) for the anſwer muſt be a poſitive denial *in toto*, and muſt reſt ſingly thereon. There is a breach of promiſe; but attended alſo with fraud upon the teſtator as well as the plaintiff, by repreſenting as if there was no occaſion to alter the will, and comes within the proper juriſdiction of this court as *impoſition*. The caſes cited, of which kind there are ſeveral others, are upon this foundation: nor does this caſe differ in reaſon and equity, although that of *Thyn* v. *Thyn* was attended with other circumſtances of aggravation. So in 2 *Ver.* 506, as to the caſe in 1739, I do not remember it particularly; and all theſe caſes depend on the

Where but one witneſs againſt an anſwer, the anſwer muſt be a poſitive denial *in toto*, and reſt ſingly thereon.

(f) Ante 97.

the particular circumſtances: but a material difference appears as it is ſtated; the promiſe there not being made by the executors, but by one only of the legatees. The promiſe there was in direct contradiction to the written will; it is not ſo here, where the defendant is executor: but I do not give any certain and concluſive opinion thereon. Upon the merits therefore the plaintiff is intitled to the relief prayed.

But as to the next queſtion: whether to have an immediate decree perſonally? Firſt from the nature of the undertaking, I think it does not bind him perſonally, as it would, if he had given the note; for ſuch promiſes muſt be underſtood with reference to aſſets, otherwiſe men might be drawn in; for it ought not to operate out of the executor's own eſtate, binding only to pay out of the teſtator's. Secondly, as to the promiſe after the teſtator's death: I at firſt doubted if it would not bind him perſonally; which I would do, if I could: but fear it would be going too far upon ſo looſe a thing as this promiſe is. It is no promiſe. Then there is no conſideration ariſing; the plain meaning being not to bind himſelf in a bond, but to pay it as a legacy when the year and day ſhould be out, which is all I can infer. (g) At law if an executor promiſes to pay a debt of his teſtator, a conſideration muſt be alledged; as of aſſets come to his hands; or of forbearance; or if admiſſion of aſſets is implied by the promiſe: otherwiſe it will be but *nudum pactum*, and not perſonally binding upon the executor; and this being ſo ſoon after the teſtator's death, the executor might not know the value of the effects. (126)

The queſtion then is, in what order the plaintiff is to come, ſince it is a decree out of aſſets: which muſt be ſo, as not to break in upon other legatees; which would be turning it into a fraud upon them, by making them abate in proportion upon a deficiency; for that indeed would break in on the ſtatute of frauds. So that this promiſe by the executor and reſiduary legatee amounts to payment out of the ſurplus.

(h) But

(g) *Aſſumpſit* lies againſt an executor for a legacy, on a promiſe in conſideration of aſſets; but if the action is brought perſonally in his own right, judgment can only be de bonis propriis. Cowper 284, 289. Cro. Eliz. 91, 406.

Coſts againſt executor.

(h) But the plaintiff muſt have coſts perſonally to this time, the defence being on a wrong foot; the anſwer evaſive and contradicted.

Legacy larger than a debt, a ſatisfaction for it.

As to the debt, although I think the caſes of ſatisfaction by implication barely have gone far enough: yet I cannot diſtinguiſh this, nor can I take it upon a different foot, than if it had been in the will. So it muſt be deducted.

Caſe 74. Bingham *verſus* Bingham, *October* 27, 1748.

Maſter of the *Rolls* for Lord *Chancellor*.

AN agreement was made for the ſale of an eſtate to the plaintiff by defendant, who had brought an ejectment in ſupport of a title thereto under a will.

The will was to have the purchaſe money refunded, as it appeared to have been the plaintiff's eſtate.

Equity relieves againſt miſtakes.

It was inſiſted, that it was the plaintiff's own fault, to whom the title was produced, and who had time to conſider it.

Decreed for the plaintiff with coſts, and intereſt for the money from the time of bringing the bill; for though no (127) fraud appeared, and the defendant apprehended he had a right, yet there was a plain miſtake, ſuch as the court was warranted to relieve againſt, and not to ſuffer the defendant to run away with the money in conſideration of the ſale of an eſtate, to which he had no right.

Peacock

(h) In 2 Vol. 85, executor decreed to pay coſts for miſbehaviour; and in 1 Brown, 362, he was refuſed coſts, as the expence was occaſioned by his own delay, though executor has a claim to coſts. Poſt. 519. 2 Vol. 635.

(i) Ante 106.

Peacock *verſus* Monk, *October* 28, 1748. Caſe 75.

ADmiral *Leſtock*, going to ſettle his affairs, upon the ſame day *17th July*, 1746, makes two inſtruments: one he called a deed by way of agreement between him and the defendant *Monk*; the other he called his will: by the deed he puts 4000*l.* into the hands of *Monk*, to pay to the admiral himſelf for life an annuity of 160*l.* and afterwards to pay 1000*l.* a-piece to *Peacock* and *Cockburn*, if they ſurvived him: and an annuity of 100*l.* for life to *Mrs. Knowles* his houſekeeper, if ſhe ſurvived him: the reſidue to *Monk*, *Proviſo*, that if the 160*l.* annuity be unpaid after any quarter-day, *Monk* ſhall repay the 4000*l.* to Mr. *Leſtock* himſelf, to be placed out in the names of *Leſtock* and *Monk*. By the will he makes *Monk* executor and reſiduary legatee.

A. makes *B.* Executor and reſiduary legatee, and by deed of ſame day veſts 4000*l.* in *B.* to pay an annuity to *A.* for life, and afterward 1000*l.* a-piece to *C.* and *D.* and an annuity to *E.* if they ſurvived, *&c.* it is a voluntary and teſtamentary act, and void againſt the general creditors within 13 *Eliz.*

After his death *Monk* made ſome payments: but diſcontinued them upon notice of a bond creditor; apprehending there would not be ſufficient to pay that and the others alſo: which occaſioned the preſent bill by the three perſons claiming the benefit of the truſt ariſing under the deed.

Objected, that they had not made the bond creditor a party, who had alſo filed a bill, and would have a right to ſay, that nothing done in this caſe would bind him; and therefore both cauſes ſhould come on together, leſt there might be inconſiſtent decrees: nor could even the plaintiff or the defendant otherwiſe be ſafe. In general on a demand againſt an executor, it is not neceſſary to bring the other creditors before the court, but the executor only who is the proper perſon to defend, and will be ſuppoſed to do this duty. But here the demand is not out of aſſets, but out of a ſpecific thing; and it is a mixed cauſe, differing from the common caſe; the executor being contractor in the covenant, and ſo concerned himſelf; and colluſion between him and the plaintiffs might be objected; nor may he be able of himſelf to make ſo good a defence; and ought not to be put thereto without having thoſe parties, who ſtill are intereſted, and as to whom he is but a truſtee.

To which it was anſwered, that in general it was ſufficient for a plaintiff to bring before the court thoſe perſons, who

(128) who could intitle to make a decree in his favour: although there are ſeveral caſes, where it is neceſſary to bring every perſon who will enable the defendant to make a defence; which is done here. The perſon objected not to have been made a party, is only in nature of a common creditor, and then if there are any other debts, the plaintiff will be bound to make all, even ſimple contract creditors, parties; which would render it impracticable to come at a debt in this court; and is the reaſon, that in the caſe of executors, the court acts oppoſite to its own rule in other caſes of making all perſons intereſted parties.

Lord *Chancellor* would not determine this queſtion, till he heard the merits.

The plaintiffs offered to read evidence of the ſervices done by them to Mr. *Leſtock*, as a conſideration of the deed, it was oppoſed, becauſe no conſideration was mentioned in the deed to warrant the reading.

LORD CHANCELLOR.

Where any conſideration is mentioned in a deed, and not ſaid for other conſiderations, you cannot enter into proof of any other; otherwiſe where no conſideration at all in the deed.

This proof ought to be read: the conſequence afterward muſt be conſidered, compared with the nature of the deed; it differing from the common caſe upon which the objection is founded: for to be ſure where any conſideration is mentioned, as of love and affection only, if it is not ſaid alſo *and for other conſiderations*, you cannot enter into proof of any other: the reaſon is becauſe it would be contrary to the deed; for when the deed ſays, it is in conſideration of ſuch a particular thing, that imports the whole conſideration, and is negative to any other. But this is a middle caſe, there being no conſideration at all in the deed. I will ſuppoſe two caſes: one at law, before the ſtatute enabling the bringing an action at law on promiſſory notes, without proving a conſideration. Theſe notes were frequent without ſaying any conſideration; yet before that act a conſideration muſt have been ſhewn at law: and it might have been there ſaid, it was contrary to the writing. The other is a caſe in this court: ſuppoſe a father has a ſum of money, being a gift to a child from a collateral relation, in his hands; and makes a bill of ſale of goods, or declares a truſt for that child, without ſaying for love or affection, or mentioning any conſideration at all: upon a queſtion here the child may ſhew, this gift was in ſanction for what was in his hands from the collateral relation.

The

The ſervices proved were, the aſſiſtance given to Mr. *Leſtock* by two of the plaintiffs, in making his defence upon his trial by a court *martial*, and the pains and labour they were at; and that *Knowles* the other plaintiff nurſed him in his illneſs. As anſwer was alſo read, in which he acknowledged the ſervices of the plaintiffs, one of whom was his nephew; and that he would ſettle his affairs, and make a proviſion for them. (129)

And it was argued for the plaintiffs, that they had a legal claim in *Leſtock*'s life. The deed is fair, he might diſpoſe of his property; nor will the reſerving an intereſt to himſelf make it otherwiſe. If a creditor is ſatisfied to take the debt in a way moſt for the debtor's eaſe, other creditors after his death cannot ſet aſide this compoſition; which ſhews it not to be a teſtamentary act. Suppoſe, inſtead of paying it to *Monk*, he had paid it to the plaintiffs to whom he was indebted, upon their paying him the intereſt for life; it would be good, and not applicable to the debts at large: otherwiſe it would be out of the power of a debtor to compound, or do any thing but directly pay the money down. It ceaſed to be his eſtate, and though by the *proviſo* it might come to his hands again, ye he could not appropriate it to other purpoſes than in the original engagement. This is not ſuch an act, as the rules will not warrant. The ſtatutes of fraud take not in tranſactions of this ſort; all the acts of parliament proceeding on a foundation of aliening with a view to defeat creditors. If a debtor, inſtead of paying a ſum of money, lays it out in purchaſe of land, and agrees with the creditor to limit it to himſelf for life, remainder to the creditor in ſatisfaction of the debt; it could not be defeated. Nor is there any inſtance where a purchaſe ſhall be looked on within any of the acts mentioned in 13 *Eliz. Fletcher* v. *Lady Sidley*, 2 *Ver.* 490. The plaintiffs had at the time a claim againſt him, which his death cannot alter; and aſſets are conſequential to the right the party had in his life. Its not being revocable in its own nature, which is the criterion of a teſtamentary act, ſhews it not to be ſuch: nor was it in contemplation of his death, for certainly juſt before his death he could not diſpoſe of his goods; but he might have made them this recompence immediately for their ſervices; which would not then have been reſcindable or fraudulent; nor could the court follow it into their hands. Then the poſtponing it till after his death, which was done out of affection to him, as the plaintiffs might have brought an action and recovered damages, is far from making it fraudulent. The deed,

though

though not expreſſed to be for theſe ſervices, yet from the proof read appears to be ſo, and to be accepted by the plaintiffs in recompence, by their not demanding any other: nor will the court weigh it with exactneſs, or ſend it to a jury to ſee whether the conſideration be adequate or not.

For the defendant: The queſtion is, whether this is to be conſidered as aſſets of *Leſtock*, and ſo charged with debts in general; or as a ſpecific thing, in which the plaintiffs are intereſted, and have a demand againſt *Monk* in his own capacity? The deed imports on the face of it, to be without conſideration as to the plaintiffs though as between *Leſtock* and *Monk* it is on conſideration. Then the plaintiffs call in aid the ſervices; but the value thereof does not appear; the evidence not ſtating it, nor is it ſuggeſted by the bill: and though the plaintiffs were intitled to bring an action upon the caſe for them, that is not ſufficient; for the plaintiffs want to have a ſpecific thing for the purpoſe by contract of the party; for which it is neceſſary to ſhew, that ſuch was the intent, and that it was accepted by the plaintiffs as a ſatisfaction for the debt due for thoſe ſervices; which will not be be preſumed. When that acknowledgment by Mr. *Leſtock* was made, does not appear; ſo that it may be applicable to any other intent to make a proviſion for the plaintiffs; but making a proviſion is different, and imports a bounty, and makes againſt the plaintiffs. Suppoſing then, no conſideration; the queſtion is, whether it is not the property of the teſtator, ſo as to be aſſets? The ſettling of an eſtate without conſideration makes it void as to creditors; though perſonal eſtate may be given away in one's life, yet muſt the poſſeſſion be parted with; for the retaining that will be conſidered as a fraud in law or equity; and here he himſelf was to receive the benefit of this contract during life; the plaintiffs only claiming a reverſionary intereſt afterward: and though it is not ſtrictly under a teſtamentary inſtrument, yet it is to have the effect of ſuch, only that is not revocable: and yet on a contingency it might again be his eſtate: and there is no caſe where the party on a diſpoſition has retained the intereſt in his life, that the court has held it not to be aſſets. As in the caſes of bankruptcy, and on the cuſtom of *London*; for a father might give what he will to a child without fraud; but if he retains it himſelf, it is a fraud upon the cuſtom. As on a bond to provide for a child after his death; the child may have the benefit out of the teſtamentary part; but not againſt the widow or children. So 2

(130)

Ver.

Ver. 202. and *Combes* v. *Ellin*, *March* 2, 1747, where an old freeman purchaſed a term for years after a ſtranger's death with his own money in the name of himſelf and his wife jointly, and died. The children brought a bill, to have this leaſehold diſtributed as part of his perſonal eſtate; and the court was of that opinion, and that it ſhould take place againſt the wife's ſurvivorſhip: for being purchaſed with his own money, it ſhould be the ſame as if it was for himſelf for life, and afterward to his wife; which is a direct anſwer to *Fletcher* v. *Lady Sidley*.

LORD CHANCELLOR.

That caſe in 2 *Ver.* 940. was only the inclination of the court on the argument of counſel; and it would be dangerous to allow the arguments, which are there: and as to the caſes on the cuſtom and bankruptcy, they are not applicable; ſtanding on particular reaſons.

All the queſtions ariſing between the parties fall under two general heads. The objection by the defendant for want of parties: and the true merits of the plaintiffs demand.

As to the firſt, I was willing to poſtpone it, till I went into the cauſe on the whole merits; becauſe the caſe is particular in its nature; the perſon who is covenantor, being alſo executor; and the rather, becauſe it may ſave expence to the parties, and probably prevent further litigation in the other ſuit. The objection does not prevail: and if allowed, might make an inconvenient precedent. The true queſtion is, whether the property ariſing under this deed, and benefit of this truſt, muſt be conſidered as the plaintiffs property, or part of Mr. *Leſlock*'s perſonal aſſets? for to that it will reſult; that is, part of the produce of his perſonal eſtate ſo diſpoſed of as not to bind creditors. Then who is the proper perſon to make defence, and to inſiſt that this is not ſuch a diſpoſition, but the executor? It is ſaid, that ſtill the creditors are intereſted; the executor as to them being but a truſtee, and ought not to be put to make that defence without having them parties. Whether fewer or more creditors makes no difference; for the court muſt go on ſome rule: and the queſtion is, whether it is neceſſary to make more than the executor party. It is truly ſaid for the plaintiffs, that if bound to make one, they are bound to make all, even ſimple contract creditors parties; they having an equal right to

Not neceſſary to make more than the executor party, who ſuſtains the perſon of teſtator for him, creditors and legatees.

to controvert that point; for if what the defendant inſiſts upon is right, the plaintiffs can no more claim in prejudice of one, than the other: which would be a ſtrange rule, and muſt then be always done. Theſe caſes often ariſe; and the direction is to take an account, *&c.* and all the creditors to come before the *maſter* to prove their debts; which if they do, and it is objected, that they are not creditors for valuable conſideration, that queſtion might be entered into there, and come before the court upon exceptions. If indeed there is a bill by a ſingle creditor or perſon claiming part of the eſtate, as it is here, the court at the hearing the cauſe will and ought to determine it: but that is not neceſſary in all caſes, (k) and ſhews it not neceſſary to bring all before the court; the executor in all caſes ſuſtaining the perſon of the teſtator, to defend the eſtate for him, creditors, and legatees: but if colluſion, a particular caſe muſt be made of that. But here the objection and defence made, ſhews no colluſion between the executor and the plaintiffs; and there is a plain anſwer to the executor's not being able to make ſo good a defence, *viz.* that here he is alſo contractor with *Leſtock*, and party to the tranſaction.

As to the next point, on the merits: I have been willing to give great attention to find foundation to decree this demand for the plaintiffs, as a demand for valuable conſideration, without incurring the danger of a precedent againſt the rules of law and of this court particularly.
(132) The ſervices were probably very beneficial, and deſerved a reward; but upon the whole circumſtances, I cannot be ſo ſatisfied as to allow this diſpoſition to prevail; which might chalk out a way, whereby any one, who intended a bounty to a particular creditor, might at the inſtant of making his will do that, which would amount to a legacy in its nature, by ſevering part from the reſt, and the other creditors go without ſatisfaction. The obſervation is right, that this deed is in two reſpects, being for valuable conſideration with reſpect to *Monk* the grantor; but not as to the plaintiffs: for I am very doubtful, notwithſtanding the merits of the ſervices, whether they were ſuch, as would intitle either of the plaintiffs to an action againſt Mr. *Leſtock*. There

(k) In a bill againſt the executor by creditors on legacies, it is not neceſſary to make the reſiduary legatee a party, though Lord Loughborough thought, as being intereſted, he ought to reſiſt the demands, and that all parties intereſted ought to be before the court, but the practice being ſaid to be contrary, it was ſo decreed. 1 Brown, 303. 1 Eq Ab. 73. Pl. 13. 2 Brown, 87.

There is only proof of the facts done; but of no promiſe to recompence: what demand could *Knowles* have againſt him? I cannot preſume that ſhe was paid no wages, or that he intended to pay her merely by giving this annuity afterward, if ſhe ſurvived him; and the acknowledgment in the anſwer is like a man providing for relations; not paying a debt, but a bounty out of gratitude for ſervices performed: and the words themſelves only import that: he has reſerved exactly the intereſt at four *per cent.* for himſelf for life, giving only a contingent intereſt to the plaintiffs, if they ſurvived him; which is a ſtrange way of paying a debt. It is true, by a particular contract proved, a creditor might accept ſuch an intereſt by way of accord and ſatisfaction; but that ſhould be proved. Suppoſing more proof that theſe ſervices were ſuch, for which an action could be maintained: it was not accepted as a ſatisfaction; nor any contract binding to ſuch acceptance, which ought to be in all caſes of this kind; that is, ſuppoſing it a debt: ſo that it is merely voluntary in conſideration both of law and equity, as to others claiming for valuable conſideration, whether ſpecifically, or as general creditors. Then as to the conſequence, and whether it could be good againſt creditors: it depends on its being fraudulent or not. I do not mean as to the intent, (although there is ſomething like that) but a colourable fraud againſt creditors in the notion of this court; and I am of that opinion, from the act 13 *Eliz.* which includes all goods and chattels: and though money has no ear-mark, yet if in truſt, it is another matter; for though it be not the ſpecific 4000*l.* which was paid, yet it is the profits thereof; which is equally within the words of the ſtatute; preventing creditors from a ſatisfaction for their debts by taking part of the debtors property. But there is ſomething bringing it nearer to thoſe caſes, which have been determined without any difficulty; that if there is a power of revocation in ſuch a deed, it is a conſtant evidence of fraud: and here is that, which amounts thereto by the *proviſo*; putting it in the power of *Monk* to enable *Leſtock* to defeat it: or it might be done by colluſion, to which the only anſwer attempted to be given is, that though it would defeat *Monk*'s intereſt, ſtill the truſt for benefit of the plaintiffs would ſubſiſt. But what remedy for that truſt could the plaintiffs have againſt *Leſtock?* becauſe it is not a contract for valuable conſideration; for then they might come here for a ſpecific performance; but being merely voluntary and *nudum pactum*, upon a bill brought here, it muſt be diſmiſſed. And there is one thing that looks

looks like ſuch an intent; that on its being repaid to *Leſtock* for default of *Monk*, it was ſtill to be placed out in the name of *Monk*, making him truſtee again. But abſtracted from the ſtatute, and although it never had been made, upon the particular circumſtances, this would not be binding on creditors in this court. *Monk* being both executor and contractor in the deed, and both inſtruments being done at the ſame inſtant (as it muſt be taken, being on the ſame day) it ſpeaks the whole to be a teſtamentary act. Then why were they divided but to give the plaintiffs a preference to other legatees or creditors? In ſeveral caſes the nearneſs of one act to another makes the court take it as one, ſo that it is a teſtamentary act; though not ſtrictly ſo, becauſe not revocable: yet I have ſhewn how it might be revoked. And wherever a court of equity finds ſuch a turn given to a tranſaction to defeat creditors, reſerving the benefit of it to the perſon himſelf; the court will be very nice to find out a diſtinction for creditors. It is true indeed, that a man may give money in his life, as he pleaſes, without creditors calling to an account, or having it refunded: but then he muſt abſolutely depart with the benefit of it during his life; otherwiſe a court of equity will inquire very ſtrictly into it. So here there is no parting with the uſufructuary intereſt; and it ſhall not prevail againſt creditors even by ſimple contract, but againſt reſiduary or other legatees they are intitled by their ſpecific lien on it.

But then a queſtion ariſes among the plaintiffs themſelves, whether *Knowles* ſhall abate in proportion with the others? For an annuity has been determined to be a ſpecific legacy and not to abate with pecuniary. But here the legacy is a ſum of money, and the annuity in truſt thereout, and to come out of the whole.

Reſerve that queſtion.

Caſe 76. Butterfield *verſus* Butterfield, *October* 29, 1748.

Poſt. 154. *Appeal* from the *Rolls*, where it was heard as a cauſe by conſent.

Deviſe of 400*l.* to be put out on good ſecurity for *T. B.* that he may have the intereſt for his life, and for the heirs of his body: if he die without heirs, then over. The whole property veſts in the firſt taker, and the limitation too remote.

THE bill was to have a queſtion determined, which aroſe on the will of *T. Butterfield*, *viz.* "*I deſire*, that 100*l.* *ſhould be put out on good ſecurity for my ſon* T. Butterfield,

Butterfield, *that* (l) *he may have the intereſt of it for his life, and for the lawful heirs of his body: and if it ſhould ſo happen, that he ſhould die without heirs, it ſhould go to my youngeſt ſon* John Butterfield, *and the lawful heirs of his body.*"

The queſtion was whether *T. Butterfield* ſhould have it as his own property abſolutely, or only the intereſt for life; and afterward for the benefit of his children, if any; with a limitation over to his brother; but the brother gave up his intereſt. (134)

And it was argued to be an eſtabliſhed rule, that where perſonal eſtate is given for life, and then to the indefinite heirs of the body, there being no recovery by which the intail of perſonal eſtate can be barred, the firſt taker may diſpoſe of it, as he pleaſes. and though a perſonal cannot deſcend as a real eſtate, yet if it was intended to go in that courſe of deſcent, which would be an intail of land, the firſt taker has the abſolute property, and remainder over cannot take effect. Then here it plainly was meant to the heirs of the body, as heirs; which cannot be confined to any particular child or children by purchaſe; for then the inſtant they were born, it would veſt in them, and their repreſentative would take, which could not be ſo here: Nor could he mean children living at time of the death, for if ſuch child died, leaving iſſue, he meant the grandchildren ſhould take. In Lord *George Beauclerc* v. Miſs *Dormer*, *June* 17, 1742, a diſtinction was contended for, that where a real eſtate was limited after a death without iſſue, it ſhould be conſtrued indefinitely: but if a perſonal, the court would ſuppoſe it to mean at the time of his death; but his *lordſhip* held, that in caſe of a perſonalty, it was after an indefinite dying without iſſue, and too remote. Was this queſtion upon a limitation of real eſtate, it would not bear an argument, ſince the late determination of *Colſon* v. *Colſon* in *B. R. Bagſhaw* v. *Spencer*, *Poſt.* ſo that if this was a real eſtate, it clearly would be an eſtate tail.

LORD CHANCELLOR.

My apprehenſion is, that if this was of land, it would be an intail; (m) and that therefore it veſts the whole property

(l) 2 Vol. 263.

(m) Where there is an expreſs limitation of a chattel by words, which if applied to a freehold, would create an *expreſs eſtate tail*, the whole intereſt veſts abſolutely in the firſt taken, and the limitation over is too remote; but where there is no expreſs legal limitation, the court will conſider the intention of the teſtator. Per *Aſhurſt*, Juſ. Durnford, and Eaſt, 596.

perty in the first taker: but there is one circumstance to differ this from the common case, *viz.* that here is no gift of the 400*l.* to *J. Butterfield*; for then I should clearly have thought him intitled to the absolute interest and property thereof, and the devise over void, as a devise of a personalty after such a limitation as would be a clear intail of lands, and too remote a contingency; because *heirs of body* import *ad infinitum*, if nothing to restrain is superadded: and in those cases, where something is superadded, both courts of law and equity have with much difficulty come into a construction to restrain it to issue living at time of the death; as the first words import *ad infinitum*. In the devise over to *T. Butterfield*, where it undoubtedly must vest the absolute property, the testator has used the same words, except for life, leaving no reversionary interest or chance to his executor or residuary legatee. Then why should it not be so in the other? In Miss *Dormer*'s case, I held a devise of a personalty to one, and the
(135) heirs of the body generally, vested the absolute property in him, and no devise over could be, if nothing more. The only thing ceating a doubt is, that here the interest only, and not the thing is devised to him; unless the word *for* imports a trust for him, which is the same as a bequest to him, it is giving him the interest for life; which in the *civil* law is called the usufructuary benefit; and whether express words of gift, or the law construes it so, makes no difference *.

(n) Let it stand over: and in the mean time I will look into the case of Miss *Dormer*.

I am always more jealous, where causes are argued on one side only: and though *J. Butterfield* gives it up; yet if a right is in the children of the first taker, the court is bound to take care of it, as much as if the other had insisted on it.

Oke

* The case of *Peacock* v. *Spooner* had been cited; which Lord *Chancellor* said he knew not what to make of; nor of the opinions of the judges, who were extremely divided, as appears from the minutes, and that Lord *Harcourt* disallowed it.

(n) Supra, 154.

Oke *verſus* Heath, *November* 4, 1748. Caſe 77.

Wife having by marriage articles power by deed or will to appoint 4000*l.* to her kin; in default of appointment to go according to the ſtatute: appoints by will to *C.* he paying an annuity in conſideration of it. *G.* dies in her life. The appointment is void, and it ſhall fall into the reſidue, but the annuity ſhall be a charge thereon.

ON the marriage of *Elizabeth Paſimer* with Sir *William Smith*, 10,000*l.* were by articles *July* 17, 1718, veſted in truſtees, to be laid out in the purchaſe of lands, to be ſettled on the huſband and wife for their lives: then for the iſſue, if any: if none, a term of 500 years was created, that if the wife died in life of the huſband, the truſtees ſhould raiſe and levy 4000*l.* for ſuch perſon or perſons, as are or ſhall be her kin, and for none other whatſoever, as ſhe by any deed or will, or writing under hand and ſeal purporting, or in nature of a laſt will, ſhall, notwithſtanding coverture, direct, limit or appoint, to be paid within twelve months after due, in ſuch manner as ſhe by the ſaid deed, *&c.* ſhould, *&c*, and for default of appointment, to be paid and divided among ſuch of her kin as by the ſtatute of diſtribution would be intitled to her perſonal eſtate, if ſhe died unmarried and inteſtate. But if the money was not laid out in lands, then after payment and deduction of the 4000*l.* to ſuch as ſhe ſhould appoint as aforeſaid, the reſidue and ſurplus ſhould be paid to her huſband.

Having no iſſue living ſhe on the fifth of *May* 1743, makes a will, and reciting her power ſhe directs, limits, and appoints the 4000*l.* to be paid to her nephew *Wm. Gill* for his own uſe and benefit: but in conſideration thereof he to pay to his mother an annuity of 100*l. per ann.* during her life for her ſeparate uſe, and to enter into a bond with a penalty for payment thereof. And all the reſt and reſidue, of what ſhe had power to diſpoſe of, ſhe gives to her niece *Suſan Gill* after paying ſome legacies thereout. (136)

William Gill dies in her lifetime; ſhe dies; her huſband ſurviving.

The plaintiffs were part of her next of kin, claiming under the articles by the ſtatute of diſtribution in default of appointment, by the death of the appointee in her life.

A croſs bill was brought by—*Gill*, father of the appointee, as repreſenting him, and alſo for the arrears of his

wife's annuity, who was dead, and by *Heath* and his wife, *Suſan* claiming the whole by the reſiduary clauſe.

For the plaintiffs it was argued, that *Suſan Heath* was not an object within the articles; not being in *eſſe* at the time of making them; and the articles only deſcribing the perſons, the proportions muſt be now ſettled by the court; which will make an equal diſtribution *per capita* and not *per ſtirpes*, as held in *Thomas* v. *Hole*, *Caſes in the time of* Lord *Talbot* 251: where a perſonal eſtate was left to be equally divided among relations: and decreed, that the ſtatute of diſtribution ſhould be the rule as to the perſons to take, but that they ſhould take *per capita*. So in 1 *Wm.* 343. the appointment was complete; ſo that it could not be intended, that this 4000*l.* ſhould fall into the reſidue, out of which legacies are alſo given.

Then as to the claim of—*Gill*: where a legacy is given to *A.* and out of it to pay to *B.* though *A.* dies in the life of the teſtator, it will not defeat the legacy to *B.* But that is, where the fund given to the firſt taker, is made the fund, out of which the ſecond legacy is to ariſe; as held by his *Lordſhip July* 6, 1743. But here it is different, being an abſolute bequeſt to the nephew; and in conſideration thereof a direction to ſecure an annuity; but independent of the fund; which therefore is not liable thereto. Where the ſecond legacy is given by way of truſt out of the firſt, or of remainder, although the firſt fails, the other will ſubſiſt; but not where it is by way of condition: which diſtinction was taken at the *Rolls*, *June* 7, 1739; where the deviſe was to a wife, deſiring ſhe would leave it to relations: and ſo different from the caſe in 2 *Ver.* 116. where the legacy was annexed to the other on condition, as it is here.

And further, as to the reſidue: where a perſonal legacy is given to *A.* and the reſidue to *B.* though the firſt fails, the reſidue will take it in, from the intent; ſweeping in
(137) every part, which by any act whatſoever could come within it: but no ſuch intent is here. If a particular farm is deviſed to *A.* in fee; the reſidue to *B.* *A.* dies in life of the teſtator: it was ſettled lately in *C. B.* that the reſidue ſhould not take it in.

For——*Gill* it was ſaid, the teſtatrix has executed her power, although that execution during her life is revocable; ariſing from the nature of a will, by which it was appointed

appointed with that intent. The queſtion is, whether that contingency, which depended on her nomination, being executed and put an end to by her, it was ſuch an intereſt, as is tranſmiſſible to the repreſentative? The general objection thereto is from its being a teſtamentary diſpoſition, and like every other lapſe; which is ſo, if mere teſtamentary. But this not properly a legacy; the ſettlement having entirely diſpoſed of it to ſuch of her kin as ſhe ſhould appoint, leaving her only a naked power and no property; ſo that ſhe could not give it by will to any other than thoſe ſhe was confined to: and the power operates, as if the execution thereof had been in the original inſtrument; and if ſo, notwithſtanding his dying in her life, it will go to his repreſentative. As in the caſe where one deviſed all the reſidue of his perſonal eſtate after death of his wife to be divided among *A.* and *B.* and five relations: the five relations died in life of the wife; their repreſentatives were notwithſtanding held intitled. The reaſon of a will's paſſing no right till the teſtator's death is, from the notion the law has of its paſſing part of the teſtator's property: but that is, when the perſon takes only under the will. There is no inconſiſtency that the repreſentative ſhould take where the anceſtor could not: as in *Co. Lit.* 378. *b.* a gift of *A.* and *B.* remainder to the heirs of him who died firſt. Suppoſe an eſtate for life, remainder to *B.* on a contingency, and *B.* dies, before it happens: his heir may take afterward, when it happens. Suppoſe it was in truſt to *A.* if ſhe appointed it: it is contingent, and if ſhe appoints after his death, it becomes certain, and deſcends to his repreſentative. So in a leaſe to *A.* for ſo many years as *B.* ſhall appoint. So if given on a chance, then the ſurviving or not ſurviving the teſtatrix makes no difference. And *Burnet* v. *Holgrave*, *Eq. Ab.* 296. is in point.

But ſuppoſing him not ſo intitled: the annuity to his wife was not lapſed by the death of his ſon; but had continuance during her life, ſo as to be a charge on the 4000*l.* The annullity of a legacy will not annul a charge thereon, being as another legacy, 2 *Domat* 192. And notwithſtanding the proviſion of the bond, the mother would have a right to ſecure it on the land; if not, it is a condition; for non-performance of which the court will lay hands on it, and make him a truſtee: as in *Wig* v. *Wig*, *July* 2, 1739, where was a deviſe of real eſtate, on condition to pay 90*l.* to three grandchildren equally to be divided between them. The deviſee on condition died in the life of the teſtator;

(138) and though it was void as to him, it was held, that the 90*l.* was a charge on the land, and ſhould be paid.

For Sir *William Smith* it was inſiſted, that there having happened a loſs on ſome of the funds, on which the 10,000*l.* were laid out, that loſs ſhould be borne by the whole, and not by the reſidue above the 4000*l.* according to the maxim, that where there is a loſs to ſeveral parties, ſtanding in the ſame circumſtances, it ſhall be borne equally; unleſs there is ſome ſpecial agreement to the contrary: as in *Chambers* v. *Chambers*, *Eq. Ab.* 115.

LORD CHANCELLOR.

There is ſomething particular in this caſe; which ought to be taken notice of, *viz.* the manner of bringing on the croſs bill; being by two different ſets of parties making different demands againſt one another, and by different counſel. Had it come only upon the croſs bill, it ſhould have ſtood over, to have one of them made a defendant, in order to convert their diſtinct intereſts: but the original bill, to which both are made parties, makes the hearing it in this manner regular, and that a complete decree may be made thereon.

The queſtions as to the rights of the parties are ſeveral: but all relating to the 4000*l.* whether the appointment to the nephew be good, or become void by his dying in life of the teſtatrix? If void, then whether the 4000*l.* or any part of it, belongs to the plaintiffs as ſome of the next of kin of the teſtatrix, or goes to Mrs. *Heath* by the reſiduary clauſe? Then as to the annuity of 100*l.* given by the will in conſideration of the appointment. Then as between all the parties claiming an intereſt, and Sir *William Smith* in reſpect of the loſs happening on the groſs fund.

As to the firſt: I am of opinion, notwithſtanding the reaſons and the authority preſſed upon me, that it is void by the nephew's death in life of the teſtatrix; firſt from the nature of the articles and intention of the parties; which was to reſerve part of her fortune ſubject to her diſpoſition, if ſhe died in her huſband's life: but having it in contemplation that it might be kept in money, if they pleaſed, in that caſe there is a diſtinct particular truſt; the view being plainly to give her as much power to diſpoſe of or leave it behind her to her own kin, excluſive of her huſband, as ſhe

ſhe was unmarried at her death. They rightly conſidered, that if they only gave her power to diſpoſe of it, the huſband might overturn it; or if ſhe died without diſpoſing, it would go to him: or if it was to her, her executors or adminiſtrators, he as adminiſtrator would be intitled to it. To ſecure it therefore againſt him, and againſt accidents alſo in all events, that ſhe might not be induced by good or ill uſage to give it to him, ſhe was limited as to her power, to give it to her kin, and to prevent accidents they provide for a direct inteſtacy. As to the obſervation that ſhe was confined to give it to ſuch of her blood as were in being before the marriage, that is not the conſtruction of the articles: the words, *or ſhall be*, import the contrary; it meant ſuch as ſhall be derived from the ſtock, in oppoſition to the kindred by marriage. This view being remembered, will go a great way to give light to any doubt afterward. Then the appointment by death of the appointee becomes void; for though it ariſes under a power, it is a teſtamentary diſpoſition, and this a teſtamentary caſe. A married woman may, by agreement before marriage and with the conſent of her huſband, make a will, which is good in the *Eccleſiaſtical* court, and may be proved there. This was a power over her own property, and which might be ſo in one event abſolutely, if ſhe had ſurvived her huſband, and part of the ancient dominion which ſhe had over this money. She has executed her power by will; and called it ſo throughout. The whole frame is teſtamentary; and plain declarations to that purpoſe: and although this ariſes out of her power to make a will, and it is a general notion of law as to powers, that any one taking under the directions of the will, take under the power, in the ſame manner as if their names were inſerted there: yet they muſt take according to the nature of the power and inſtrument taken together. I allow, that if ſhe had executed her power by deed or writing, the repreſentative of the appointee dying in her life would take thereby; but not if the appointment was, in caſe he ſurvived her. (1) Then ſhe executing her power by will, it muſt be conſtrued to all intents like a will; the conditions of which are, that it is ambulatory, revocable, and incomplete till her death: nor can any one dying in the teſtator's life, take under it. Then a perſon, married or not, appointing by will, does the ſame, as if it was, in caſe the appointee ſurvives; from the nature of the inſtrument, which every one is preſumed to

Appointment by will under a power, void by the death of appointee in life of teſtatrix.

(1) Wms. 624. 2 Vol. 75, 612.

to know. As to its being ſaid, that the appointing by will was only with intent to leave it in her power to revoke: how can I divide it, or ſay, ſhe meant one quality of a will more than another? She might very ſenſible mean both; for though ſhe might have a regard for her nephew, ſhe did not know who would be his executor or adminiſtrator. That would not be a ſenſible intent: nor could it have had its effect; for if the executor was not of kin, he could not take, unleſs as repreſentative. The moſt natural perſon was the father of the nephew, whom ſhe could hardly intend; for what ſhe has given to his wife, is excluſive of him. This indeed is not an argument of weight, the foundation of my opinion being, that wherever there is ſuch a power to a married woman, which ſhe executes by will, it is ſubject to all the qualities of a will: which manifeſtly differs it from the caſes of any other writing or deed, which would be complete, and not recoverable; and then it muſt veſt. It is ſaid, the matter of this appointment is
(140) not teſtamentary, partaking of real eſtate, and not to follow the rules of law in perſonal eſtates. But abſtracted from the power, it is clearly otherwiſe in its nature: if laid out, it would be a term, which is a chattel; if not, it would be money. Againſt this reaſoning the principal thing inſiſted upon is the caſe of *Burnet* v. *Holgrave*; which indeed is a very particular and extraordinary caſe; and ſuch as, I doubt, if it would be ſo determined now: however it appears by the *Regiſter* to have been a cauſe by conſent, and not adverſary; which takes off greatly from the weight of the opinion there, proving it to have been probably ſudden and without conſideration. But taking it as it is, there are ſeveral differences: firſt the wife thereby marrying a ſecond huſband, had diſabled herſelf from making a will: nor is the power given to her to be exerciſed during coverture; therefore it could not be a will, but muſt be conſidered as a writing under hand and ſeal only; and then the determination may be right: but that is nothing to this, which is by a will properly proved as ſuch. But ſuppoſe the court took it as a will, or a writing in nature of a will; the appointment there was not perſonally to the huſband only, but the executors or adminiſtrators, and on truſt to pay thereout. It is true that in general, the words *executors* or *adminiſtrators*, are underſtood as repreſentatives only; but not always: as in caſes *per auter vie*, executors or adminiſtrators take not as repreſentatives of the firſt taker, but as new ſpecial occupants newly named in the will or deed; and if they took ſo as to be further perſons taking the truſt, in that light it is different. And the

court

court rather did this in ſupport of the truſt; one of the *ceſtuy que truſt*, for whoſe benefit it clearly was, being then living; nor can the *ceſtuy que truſt* be defeated by the death of the truſtee in the teſtator's life. The words are, that the court took it an execution of a truſt; which is not a *miſprint* inſtead of *power*; and imports the huſband, his executors or adminiſtrators, to be barely truſtees. Another thing in ſupport of that determination is, that all was come back to the wife herſelf; the huſband to whom and his executors ſhe had appointed, dying in her life, and making her executrix: theſe particular circumſtances make it no authority to govern the preſent caſe; but at moſt it is but a ſingle caſe, and contrary to the general reaſoning which I have gone upon.—— *Gill* therefore cannot take this 4000*l.* as repreſentative of his ſon; by whoſe death in life of the teſtatrix the appointment of him lapſed and determined.

The next queſtion is, whether, on its being void, the 4000*l.* or part of it, ſhall go to the plaintiffs as ſome of the next of kin, or to Mrs. *Heath* by the reſiduary bequeſt. On the whole I am of the latter opinion, on the true intent upon the articles and the will. If this is teſtamentary, it muſt be ſo throughout; otherwiſe it would be contradictory: but my particular reaſons are theſe. The general view of the parties above-mentioned muſt be remembered. (141) If it goes among the reſt of kin in default of appointment, it muſt be according to the rules of the ſtatute as to the proportions alſo, ſo as not to take *per capita*; and I muſt ſay, ſhe has died abſolutely inteſtate as to this ſum. But how to ſay that of a perſon, who made a will, by which ſhe has given the whole, I cannot conceive. There is indeed a plain difference as to the will of perſonal and real eſtate; in perſonal it ſpeaking forward; and taking in all which accrued from the making till the death: it is otherwiſe of lands, which paſs only ſuch, as the teſtator was ſeized of at the making. And ſo I take the reſolution of *C. B.* to be: that on deviſe of a farm to *A.* and his heirs, and all the reſidue to *B.* if *A.* dies in life of the teſtator it ſhall not paſs into the reſidue; which point was much litigated in *Goodright* v. *Opey*, wherein the court of *B. R.* was divided; but I ſhall not diſpute that determination; it depending on the rules and nature of real eſtate, and not as being a ſpecific thing; for no doubt but a ſpecific bequeſt would in ſuch caſe paſs into the reſidue. So that the reſiduary bequeſt amounts to an appointment of the 4000*l.* All caſes of lapſed legacies, whether pecuniary or ſpecific, are of that kind,

Difference as to will of perſonal and real eſtate.

Lapſe legacy.

kind, that they ſhall fall into the reſidue. This therefore being teſtamentary, muſt follow the ſame rule, as any other legacy would. But it is ſaid, there is ſomething particular here; ſhe being limited as to the objects; which would be a good objection, if the reſiduary legatee was not one of the kin: but ſhe is within that deſcription. Suppoſe the teſtatrix had ſaid, all and every thing I have power to diſpoſe of by any of the powers in me veſted, I give to my niece *Suſan:* it would be a good diſpoſition of the 4000*l.* as well as every thing elſe: then why will it not do in the reſiduary clauſe? As to the objection, that ſhe had made a complete appointment before, and could not intend it ſhould fall into the reſidue: if the appointment was complete, there is an end of the plaintiff's, whoſe claim is on its being incomplete. Another objection is, that the reſiduary bequeſt did not intend to take in this 4000*l.* from her giving ſomething out of it, to which the 4000*l.* are not liable; which ariſes from the words *paying thereout*; but that is anſwered by the fact; it being admitted, that ſhe has not made a complete diſpoſition of all her other funds; ſo that it is giving the remainder of two funds upon condition to pay out of one, over which ſhe had power to make ſuch diſpoſition.

Legacy paying an annuity; legatee dies in life of teſtator the annuity ſtill ſubſiſts.

Then as to the arrears of the annuity of 100*l.* directed to be paid to the mother of the appointee: by his death in the life of the teſtatrix, it is ſaid to become void, and nothing but a gift on condition, and not a direction to pay out of that ſum. But I am of opinion, that it amounts to the ſame, from the words *in conſideration thereof*; as was held by me in the caſe cited: and in all theſe caſes they are conſidered as charges on the eſtate, notwithſtanding the bond; that being only the future care of the teſtatrix to ſecure it. It is therefore a ſubſiſting legacy, and the arrears muſt be paid by *Heath* to —— *Gill* the repreſentative.

(142)

As to the loſs; it muſt fall upon the reſidue above the 4000*l.* which is not to be burthened with any part of it. Had lands been purchaſed and ſettled according to the firſt truſt, and afterward fallen in value or been partly ſwallowed up by an inundation, ſtill the 4000*l.* muſt be raiſed, and the owner of the inheritance can have no right againſt *ceſtui que truſt* of the term, to ſay he ſhould bear part of the loſs. The rule then muſt be the ſame, although it is not laid out in land, but in ſecurities. The direction as to that is very particular and expreſs, that after payment and deduction of the 4000*l.* the reſidue ſhould be paid to her huſband;

hand; and the general reaſon of this is unanſwerable; holding equally with regard to perſonal eſtates: that the owner has the chance of increaſe of value by accidental advantages; no part whereof would have gone to thoſe intitled to the 4000*l.* Then the conſtant rule is *quiſentit commodum ſentire debet et onus.* Againſt this there is only a caſe cited in *Eq. Ab.* 115. which I do not remember. The caſes there are ſometimes uncertain; but that caſe aroſe in the year 1720, and followed the extraordinary rules, which from the neceſſity of public affairs were then ſet up; and which will not ſerve for general precedents or hold throughout: nor does it come up to the reaſon of this; for in caſes of proviſion for children, the court makes a liberal conſtruction: but this is not ſuch a caſe; no part therefore of the loſs falls on the 4000*l.*

Bagſhaw *verſus* Spencer, *November* 12, 1748. Caſe 78.

Appeal from the *Rolls.*

BENJAMIN ASHTON, 7th *Sept.* 1725, (m) deviſed all his manors, lands, &c. to five truſtees and their heirs upon truſt, that they, or the ſurvivor of them, or the heirs of the ſurvivor, ſhould out of the lands, &c. by the rents, iſſues and profits, or by ſale or mortgage of the whole or ſo much as ſhall be neceſſary, raiſe ſo much as ſhould be ſufficient for the payment of debts, legacies, and funeral expences: and then, as to one moiety, upon truſt, and to the uſe of his nephew *Thomas Bagſhaw* for life, without impeachment of waſte; then to truſtees for and during the life of *Thomas Bagſhaw* for ſupport of contingent uſes, but to permit him to receive the profits for life, and then to the heirs of his body lawfully begotten, or to be begotten: and for want of ſuch iſſue, then to his nephew *Benjamin Bagſhaw* for life, without impeachment of waſte; then to truſtees to preſerve, &c. in the ſame manner, then to the heirs of his body; remainder to his own right heirs. As to the other moiety, to the uſe of his ſiſter *Spencer* for life, and with like remainder to truſtees, then to his nephew *John Spencer* for life, &c. like remainder to truſtees, then to the heirs of his body, then to his brother in the ſame manner, then to every other ſon of the body of Mrs. *Spencer*, &c.

Deviſe to truſtees and their heirs to pay debts; to *B.* for life without impeachment of waſte; to truſtees during *B*'s life to ſupport, &c. to the heirs of his body; to teſtator's own right heirs. This is a truſt in equity: and an eſtate for life only in *B.* with contingent remainders to his iſſue ſucceſſively

The Poſt. *Garth* v. *Baldwin*, July 18, 1755.

(m) 2 Atk. 246, 570, 577. S. C.

The teſtator died *Thomas Bagſhaw* died unmarried. *Benjamin* the ſecond deviſee brought a bill againſt the truſtees and all proper parties, to have a performance of the truſts of the will, and the perſonal eſtate applied to payment of debts, as far as it would go, and ſuch part of the real eſtate as neceſſary for the reſidue: which was heard at the *Rolls*, *November* 2, 1732, and decreed, that ſo much of the real eſtate, as would be neceſſary to anſwer the debts, *&c.* or the whole, if neceſſary, ſhould be ſold; and if there was no more than would raiſe the ſame, there ſhould be a commiſſion of partition; and if the whole, the ſurplus after the truſts performed ſhould be reinveſted in the purchaſe of land; reſerving the conſideration how the remainder of the truſt eſtate ſhould be limited till after the report. In the ſame term *Benjamin* the plaintiff there, ſuffered a recovery of his moiety of the eſtate. *May* 28, 1737, was the *Maſter*'s report, ſtating the debts, *&c.* that it was for the benefit of all parties intereſted, that the whole eſtate ſhould be ſold: which report was confirmed. *Benjamin Bagſhaw* ſuffered a recovery and made a will; deviſing this moiety to his wife in fee, making her executrix, and died *January* 1738. The wife brought a ſupplemental bill, in nature of a bill of revivor for carrying the former decree into execution, and to have the benefit of that moiety of the truſt eſtate, to which *Benjamin Bagſhaw* was intitled: which was heard at the *Rolls* in 1743, and decreed, that *Benjamin Bagſhaw* was intitled to an eſtate tail in the moiety, by the will of *Benjamin Aſhton*.

From this laſt decree was the preſent appeal.

Lord Chancellor having taken time fully to conſider the caſe, now pronounced his decree.

The merits depend on the firſt will; and there is nothing ſubſequent making a material variation. The rights of the parties therefore muſt be taken as they were at the death of the firſt teſtator, and the determination of the court, the ſame as if *Benjamin Bagſhaw* was now alive, and praying a conveyance of the moiety to himſelf; which reduces this caſe to two general queſtions upon the will.

Whether a truſt or legal eſtate.

Firſt, whether the eſtate deviſed to *Benjamin Bagſhaw* was a truſt or legal eſtate: that is an uſe executed by the ſtatute, or a mere truſt in equity? Secondly, ſuppoſing it a truſt in equity; whether it was an eſtate tail to him, or an eſtate for life only, with contingent remainders over to all the iſſue of his body ſucceſſively?

As

As to the firſt, I am of opinion, that this deviſe of the moiety was merely a truſt in equity: the firſt deviſe is to the truſtees and their heirs; carrying the whole fee in point of law. Part of the truſt is to ſell the whole or a ſufficient part for the payment of debts and legacies: which would carry a fee by conſtruction, although thoſe words were omitted out of the deviſe; as in *Shaw* v. *Weigh*, *Eq. Ab.* 184. Then the truſtees may ſell the inheritance of the whole by virtue of their eſtate, not of their power: they muſt have a fee in the whole, otherwiſe, as it is uncertain, what they may ſell, no purchaſer could be ſafe; which differs this from *Cordal*'s caſe, *Cr. E.* 315. cited in 8 *Co.* 96. *a.* and *Carter* v. *Barnardiſton*, 1 *Wm.* 505. and *Popham* and *Bumfield* 1 *Ver.* 79. and *Randal* v. *Bookey*, *Pre. Chan.* 162. in all of which caſes there were neither *Heirs*, nor other words of limitation, nor an expreſs truſt to ſell; being a mere chattel intereſt, like an *Elegit*, to hold till debts were paid. The only doubt I had, was on the caſe of Lord *Say* and *Seal* v. Lady *Jones*, *November* 16, 1728, before Lord *King*, and affirmed in the *Houſe of Lords* in *March* 1729, as to this point: but on examination that caſe differs in a material part; and taking together all the clauſes of the will, it amounts only to a deviſe to truſtees and their heirs during the life of ———, and only an eſtate *pur auter vie*; upon which a legal remainder may be properly limited, and ſo held: but in the preſent caſe the whole fee being in the truſtees, a remainder of the legal eſtate in this moiety could not be limited to *Benjamin Bagſhaw*. It has been argued, that it may be good by executory deviſe: but could *Benjamin Bagſhaw* thereby take a legal eſtate therein? He could not; or did not, if he might; and his deviſee cannot claim it from him; for it is too remote; being after all debts indefinitely be paid; which may in point of time exceed a life or lives in being, or any other time allowed by law. But a clear anſwer is becauſe the recovery by *Benjamin Bagſhaw* was before the debts paid; and conſequently while the fee remained in the truſtees, and he could not make a good tenant to the *præcipe*. Then ſuppoſing it a good deviſe in law to *Benjamin Bagſhaw*, this would prevent its paſſing by his will; for whatever makes the recovery void, equally defeats the plaintiff's title, whatever be the conſtruction of the will: and ſo veſts in the defendant heir at law of *Benjamin Aſhton* which makes it neceſſary for the plaintiff to admit, that all the ſubſequent deviſes are truſts in equity.

The

Whether eſtate tail or for life.

The ſecond and main queſtion (whether it is an equitable eſtate tail, or for life only, with contingent remainders to the iſſue) depends on the conſtruction of the words *heirs of the body lawfully*, &c. as they ſtand in the will, whether as words of limitation or purchaſe: for if of limitation, he was tenant in tail, and the recovery was good in equity: if of purchaſe, he was tenant for life only, and it is void. To determine which, three things muſt be conſidered. (n) The intent of the teſtator in the deviſe; whether that intent is conſiſtent with and can take effect according to the general rules of law and equity: and whether there is any particular ſettled rule or determination of the court ſtanding in the way of and preventing the intent from taking effect. Under which laſt head I propoſe to conſider the diſtinction between truſts executed and executory, and the objection urged from thence in favour of the plaintiff.

(145)

As to the intent, it is clear. The firſt motive was to make a ſtrict ſettlement among all his nephews, the ſons of his ſiſters. To all the nephews in being, and proper to be made tenants for life, he expreſsly deviſes it ſo; and in the ſame words he has penned the deviſe of the other moiety to his ſiſter Mrs. *Spencer*, who was then living; concerning whom, no doubt ſhe was but tenant for life; adding to all *without impeachment of waſte*; which, though often held not ſufficient to prevent the operation of law ariſing from the ſubſequent words, yet it is a mark of the intent to give an eſtate that would be puniſhable for waſte, if not ſo exempted: then to truſtees to preſerve, *&c.* during the life of *Benjamin Bagſhaw*; which is made the great point for the defendant; and ſpeaks firſt, that he intended to give his ſeveral nephews, and particularly *Benjamin*, ſuch eſtate only as might be forfeited. The eſtates to the truſtees is after the determination of his eſtate for life; which could be determined but two ways, by expiration of the life or forfeiture. The former he could not mean, the remainder to the truſtees being given only during the life of *Benjamin*; therefore he muſt mean the latter. The next thing is, that there were ſome contingent uſes or remainders to be preſerved; and throughout the deviſe there are none, unleſs the limitations to the heirs of the bodies of the ſeveral nephews are ſuch. The queſtion then upon the intent is, whether theſe circumſtances are not as ſtrong to reſtrain this

(n) If teſtator's intention appears that he meant the word *heirs* in a legal ſenſe, the rule in Shelley's caſe muſt take place, though there ſhould be expreſs words that the heirs ſhould take by purchaſe, or that deviſee ſhould have only an eſtate for life, but the rule is not applicable where teſtator uſed the words in any other ſenſe, 1 Brown, 206.

this to a deviſe for life only, as if expreſſed by negative words, as *non aliter*; which in 1 *Ven.* 231. was admitted by Lord *Hale*, to make it but an eſtate for life: and in *Backhouſe* v. *Wells*, *Eq. Ab.* 184. *H.* 10 *Anne*, the eſtate for life was not abſorbed in the ſubſequent limitations. So here, from the teſtator's declaring his meaning as to *waſte*, *forfeiture*; and it being followed by contingent remainders, it amounts to the ſame, as if he had expreſsly declared his meaning that it ſhould be for life only, with contingent remainders to the heirs of his body. The plaintiff's counſel were under great difficulty to frame an argument, ſhewing the intent to be in their favour, and only relied on this; that the teſtator has ſhewn by the will that he underſtood the difference between words of limitation and words of purchaſe proper to make a contingent remainder: and therefore that in the deviſe of the other moiety, where he gives it to thoſe after-born ſons of his ſiſter, to whom he intended an eſtate tail, it appears, he knew, that the words *heirs of the body* would create an eſtate tail. But the difference of the penning imports the contrary, and ſtrengthens the evidence of the intent on the other ſide; ſhewing that as to thoſe born, the teſtator knew he could make them tenants for life only with contingent remainders, *&c.* but not thoſe unborn: and with this view therefore he left out the words *for and during their natural lives, and without impeachment of waſte*, and no clauſe to preſerve contingent remainders: which plainly ſhews, that in the firſt he meant a mere eſtate for life, and to uſe *heirs of the body* as words of purchaſe, and in the other as words of inheritance and limitation, becauſe the law would not ſuffer a contingency after a contingency. (146)

Then admitting this to be the intent: The next queſtion is, whether it is conſiſtent with, and can take effect according to the general rules of law or equity? And here the plaintiff places her great ſtrength; for it is ſaid, that the law will not ſuffer its rules to be contradicted; but will ſuperſede the intent, and reduce the gift to its own operation, ſuch as it will allow; and that it is a clear rule ever ſince *Shelley*'s caſe, that wherever the anceſtor takes a freehold, and by the ſame gift there is a limitation to his heirs, or heirs of his body, they are words of limitation, not purchaſe, and the eſtate unites and gives an inheritance. I admit the general principle, that the law will not ſuffer deviſes contrary to its rules; but it is miſapplied here; the true application being to the nature and operation of the eſtate intended to be created, and not to the conſtruction

Second point. Whether conſiſtent with general rules. 1 *Co.* 104. *a.*

1 Bro: C.R. pa: 217.

tion of the words; for though ſometimes it may be applied to ſome technical words, to which the law has fixed a certain ſenſe, yet even then it has been unſkilfully applied and without proper diſtinction. The law will not ſuffer a perpetuity or the freehold in abeyance in a will or deed; nor a fee upon a fee, nor a chattel to heirs; and the reaſon is, becauſe it would change the law, and by acts of private perſons vary the rules of property. It ariſes therefore from want of power in the teſtator; but in the preſent caſe, there is no want of power; there being no doubt but the teſtator might deviſe for life with contingent remainders, as the defendant contends. The only objection is, that he has uſed improper words, which the law will not allow for that, although the intent is plain: but is not this hard to ſay, and repugnant to the firſt fundamental rules in explaining wills, that the intent ſhall govern the conſtruction? The teſtator is preſumed to be *inops concilii*, and therefore, though he uſes unapt and barbarous words, the law will ſo frame and mould them, as to make proper ſenſe to ſerve the intent; as in *Boraſton*'s caſe, 3 *Co.* and *Manning*'s caſe, 8 *Co.* 95, which has been conſtantly adhered to ſince; and cannot be done here without conſtruing *heirs of the body* as words of purchaſe and deſcription. However it is ſtill urged, that the law in *Shelley*'s caſe, and in *Bret* v. *Ridgen*, *Plow.* has fixed the ſenſe of thoſe words to words of limitation: but that is ſo far from holding, that there are ſeveral caſes, even in law, in which they are held as well words of purchaſe, as in *Archer*'s caſe; the words of limitation added there, and in all thoſe caſes, are only demonſtration of the intent of the teſtator in uſing the firſt words. So in *Moor* 593, and in caſes cited in *King* v. *Melling*, and *James* v. *Richardſon*, 1 *Ven.* 334 and *Long* v. *Beaumont*, in the Houſe of Lords, *May* 1714. But there is ſtill a ſtronger authority; where even in the caſe of a deed, in conſtruing which the ſame latitude is not allowed as in wills, they were taken as words of purchaſe to ſerve the intent, *viz.* *Liſle* v. *Gray*; which through miſtake is in 2 *Jones* ſaid to be reverſed: whereas from the *Regiſter* it appears to have been affirmed. To this it was ſaid, there were ſeveral other words in that caſe, which I allow: but ſtill it is an authority, that they may at law and upon a deed, be conſtrued as words of purchaſe, if the intent requires it. The other words are only a ſign of the intent; and it is an unanſwerable argument, that if ſome words ſhewing the intent may turn it into words of purchaſe, others may; there being no magic in any particular words. To this is objected a conſiderable authority, to

Where heirs of the body words of purchaſe.

(147)

1 *Co.* 66.

Pallexſen, 2 *Ven.*

Pollexſen, *Ray.* 315. 2 *Lev.* 223.

to prove that the interpoſition of truſtees to preſerve contingent remainders between the firſt taker and the heirs of his body, is not ſufficient to turn them into words of purchaſe, (o) *i. e. Colſon* v. *Colſon*, in *B. R. May* 8, 1744, which was a deviſe by *Robert Bromley* to his grandſon *Robert Colſon* and his aſſigns for his natural life, of all his reverſionary right and intereſt expectant on the death of his ſiſter; and after the determination thereof, to truſtees and their heirs during his life, to ſupport the contingent remainders after named from being deſtroyed: but to ſuffer him to receive the rents for life.; and after his death to the heirs of his body lawfully begotten or to be begotten: in default of ſuch iſſue, to another grandſon in like manner, with the ſame truſt to preſerve, *&c.* and then to his right heirs. Upon a queſtion whether *Robert Colſon* took an eſtate tail or for life, all the judges of *B. R.* certified, that the interpoſition (p) of truſtees made him take an eſtate for life, not merged by the deviſe to the heirs of his body: but that thereby an eſtate tail in remainder veſted in him; which is ſaid to be a clear authority, that upon that will the inſerting a limitation to truſtees to preſerve, *&c.* was not ſufficient to change the ſenſe of *heirs of the body* into words of purchaſe, even though there were no other contingent remainders in the will. But it differs from the preſent; here being a clauſe of *without impeachment of waſte*; although that might be thought to deſerve but little weight: but the great difference is, that this is a deviſe of a truſt in equity; that of a mere legal eſtate; the words of which muſt be taken as they ſtood, according to the ſtrict legal determination; and the judges might have thought, they could not take into conſideration the truſt, but only the legal eſtate, and how that ſeparately taken could operate. But here all the limitations are of a truſt; the conſtruction and direction whereof is the proper ſubject of the juriſdiction of this court, which is bound to decree according to the intent; as was determined by the *Maſter of the Rolls*, with which I agree; and that as this is a truſt, conſequently a greater latitude muſt be allowed to comply with the intent, ſince it is to be ſettled and reduced into a conveyance by this court. Laſtly, the opinion there given furniſhes a new light, which did not appear at the laſt decree at the *Rolls*; the judges holding that the interpoſition of truſtees prevents the eſtate for life from being united with and merged in the inheritance: which affords a deciſive argument,

Difference between deviſe of a truſt and a mere legal eſtate.

(o) In Douglas 326. lord Mansfield ſaid lord Hardwicke told him that he was diſſatisfied with this deciſion, but thought it was not *now* to be ſhaken.

(p) 2 Atk. 246,

argument, that, if this caſe be law, the court muſt in directing a conveyance depart from the words of the will. The anſwer given to this difference between the caſes is, that limitations of truſt and legal eſtates are by the ſame rules, and the conſtruction the ſame in both: otherwiſe there would be different rules of property, according to Lord *Nottingham*'s conceſſions in the Duke of *Norfolk*'s caſe; which I allow; and alſo his principles. But let theſe conceſſions be rightly underſtood: he does not ſay, that the conſtruction of the words muſt be exactly the ſame in both caſes; or that a court of equity cannot expound the words more liberally, when directing a conveyance, to comply with the intention. His reaſoning there is plainly applied to the meaſure of the limitations, that they could not be carried further in one caſe than the other in limitations of a term; which appears from the words following, that a limitation of the remainder of a term after an eſtate tail therein is void. To this his other argument, that otherwiſe there would be different rules of property, is properly applied; for the meaſure of the limitation does eſſentially concern the rules of property, and how near we may approach a perpetuity; but not how far we may go to find out the true meaning of the teſtator, freed from the technical uſe of the words. Upon this reaſoning are ſeveral reſolutions. *Papillon* v. *Voiſe*, *Eq. Ab.* 185. 2 *Wms*, 472. by Sir *Joſeph Jekyl*; with whom Lord *King* concurred, that the intent was plain to give an eſtate for life only, with contingent remainders of the inheritance, upon the clauſe appointing truſtees to preſerve contingent remainders: but held it an eſtate tail by force of the technical words *heirs of the body*, as to the deviſe of the lands: though he agreed, as to the money to be laid out in lands, with Sir *Joſeph Jekyl*; who held that the intent governed in both caſes. But it is obſervable, that it was not neceſſary for Lord *King* to give that opinion; it being extrajudicial; becauſe by the ſupplemental bill the marriage articles were admitted into the cauſe, by which it appeared, the plaintiff was clearly intitled to an eſtate tail in the lands, and that it was not in his father's power to deviſe it: but upon this there is ſomething remarkable; that the cauſe being heard on *Saturday*, Lord *King* did not pronounce his decree till *Monday*; when he ſaid, he had looked into *Liſle* v. *Gray*, which was very
(149) ſtrong, and ſeemed to be leſs clear in his opinion: but as the ſupplemental bill had brought a new title for the plaintiff, he did not give it further conſideration. And it is obſervable, that he took care to expreſs, that the direction

for

for reverſing that part of Sir *Joſeph Jekyl*'s decree, relating to the writings, was founded on the ſupplemental bill; which looks, as if he wanted to avoid that point. However ſince the caſe of *Colſon* v. *Colſon*, I will urge that of *Papillon* v. *Voiſe* no further than as an authority, that a truſt eſtate by will ſo penned ought to receive ſuch a conſtruction, and the court to direct conveyance accordingly: in which the court is clearly warranted by former caſes; as in *Leonard* v. Earl of *Suſſex*, 2 *Ver.* 526. Upon which caſe I only obſerve, that if the deviſe had been of a legal eſtate, with ſuch clauſe not to alien, the ſons muſt have been tenants in tail, and there would be no operation from that clauſe: and yet upon a truſt in equity it would turn them into tenants for life. And it is difficult to ſhew, why the deviſe here to truſtees to preſerve contingent remainders, ſhould not have the ſame conſtruction. Another great authority is on Serjeant *Maynard*'s will, Sir *John Hobart* v. Earl of *Stamford*; the words of which were with immediate remainder; there followed negative words *and to no other uſe or purpoſe.* It is firſt to be obſerved that both this court and the *Houſe of Lords* conſtrued *heirs male of the body* in the ſenſe of firſt and every other ſon. Secondly, taking the words as in a conveyance by deed, the limitation to the heirs male of the body of ſuch firſt ſon was void in law; the limitation to the firſt ſon being for 99 years only, not a freehold; conſequently it could not unite with the limitation to the heirs male of the body, within the rule of *Shelly*'s caſe: and by contingent remainder it could not be good; becauſe there was no freehold to ſupport it: and yet the court made good the whole, by inſerting truſtees to preſerve contingent remainders, although the private act of parliament had not inſerted it. Thirdly, the teſtator had expreſsly inſerted in the will, a clauſe to preſerve remainders after the limitation for life to ——; and therefore it might be argued, that where he (as able a lawyer as perhaps *Weſtminſter Hall* has ſeen) had omitted it, he did not intend it; the will concluding alſo negatively, which though a more forcible objection, than what is drawn here from the different penning of the deviſe in the other moiety, to the afterborn ſons of Mrs. *Spencer*; yet did not prevail againſt the intent to make a ſtrict ſettlement. That caſe was precedent to *Papillon* v. *Voiſe*: but there are many ſubſequent. In *Aſhton* v. *Aſhton*, before Sir *Joſeph Jekyl*, *Joſeph Aſhton* deviſed 6000*l.* *South Sea* ſtock, and 1200*l.* to truſtees, to ſell and lay out in the purchaſe of lands, to convey to *George Joſeph Aſhton* for life, and afterward to the iſſue of his body: in default of 14 Nov. 1734.

ſuch iſſue, then over. *George Joſeph Aſhton* brought a bill for performance: the queſtion was, whether he had an eſtate for life or in tail? It was inſiſted for him, that had it been deviſe of land, he would be tenant in tail, and there (150) ſhould be the ſame conſtruction; but the court held it an eſtate for life only of the lands to be purchaſed; which determination ſtands unappealed from. The words of the limitation there were *iſſue of the body*, not *heirs*, as here: but that was held to be as ſtrict as the other, and equally gave an eſtate tail in lands legally deviſed. In *Withers* v. *Algood*, *July* 5, 1735. (from the *Regiſter*) *J. A.* ſeiſed in fee of ground-rents, and poſſeſſed of terms for years in houſes, conveyed to truſtees to hold ſuch as were freehold to the uſe of the truſtees and their heirs, the leaſehold to the truſtees, their executors and adminiſtrators in truſt to apply the rents and benefit of redemption to *Hannah Withers* for life, and afterward to the heirs of her body, and of *J.* and *M.* their heirs, *&c.* After the teſtator's death, *Hannah Withers* brought a bill for redemption and performance of the truſt. Upon a queſtion whether ſhe took an eſtate for life or in tail in her ſhare by this truſt, Lord *Talbot* held it only an eſtate for life; decreeing a redemption for her as tenant for life: the words were *heirs of the body*; and yet were held words of purchaſe. It has been ſaid, that the reaſon was, becauſe joined with others who were to take by purchaſe: but that amounts only to this, that a plain indication of the teſtator's intent will change words of limitation into words of purchaſe. This argument was not concluſive or of neceſſity to make them words of purchaſe. In a manuſcript caſe which I have ſeen of it, Lord *Talbot* ſaid, the rule of law was not ſo ſtrict as to controul the intent where it was plain. In Lady *Glenorchy* v. *Boſvile*, caſes in *Tal.* 3, 1733. Lord *Talbot* held, that the plaintiff took only an eſtate for life, with remainder over: but notwithſtanding held, that according to *King* v. *Melling*, 1 *Ven.* *iſſue* was as proper a word of limitation, as *heirs of the body*: and that if it had been a deviſe of a legal eſtate, the plaintiff would be tenant in tail; but being a truſt, he was at liberty to make a more liberal conſtruction to comply with the intent: and the argument that the teſtator knew the difference, and where it was proper to inſert truſtees to preſerve contingent remainders, furniſhes a ſtronger objection, than is drawn here from the limitation of the other moiety to the afterborn ſons of Mrs. *Spencer*, and yet did not prevail to ſupport the legal conſtruction of the words of the will againſt the intention.

As

As to the third and laſt conſideration; on the part of the plaintiff are objected two rules in the way of the defendant. Firſt, that though in decreeing an execution of marriage articles for valuable conſideration, the court will make ſuch conſtruction, as will render the contract effectual: yet on a will, under which all claim as volunteers, the words deviſing a truſt eſtate muſt be taken, as they are, and the court cannot depart from them. Secondly, that even in a will there is a difference between truſts executed and executory; in the latter the court uſing a greater latitude to anſwer the intent.

Third point Whether the words can be departed from.

Difference in conſtruction of marriage articles and truſts in a will.

In ſupport of the firſt objection it cited a leading authority, *Bale* v. *Coleman*, in the *Regiſter, lib. A. fol.* 309. 2 *Ver.* 670. 1 *Wms.* 142. It is true, there is a diſtinction between the conſtruction of marriage articles and of truſts in a will (o) (but it is admitted, the intent ought to prevail in both) therefore I have not cited any caſe ariſing from marriage articles. But I deny the propoſition, that, becauſe under a will all parties claim voluntarily, the words of the will deviſing a truſt eſtate muſt be taken as they are; and that the court cannot depart from them; there being ſeveral authorities to the contrary: and ſo it muſt be of neceſſity; becauſe if the court was, when bound to convey, obliged to uſe the ſame words, it would have a different operation: as for inſtance, the word *iſſue* in a will is generally and properly a word of limitation; but in a deed a word of purchaſe, and muſt operate accordingly. —Conſequently the court muſt depart from the words to comply with the intention upon the whole frame of the will. To examine *Bale* v. *Coleman* particularly. Lord *Cowper*'s decree was reverſed as to part by Lord *Harcourt*; from whoſe reaſons it has been argued for the plaintiff, more than from the judgment itſelf. The firſt part of his declaration, diſtinguiſhing it from marriage articles, is right; but has nothing to do here: and the caſe there put by him, was of articles limiting the eſtate to huſband and wife, and the heirs male of their bodies; which would be decreed here in ſtrict ſettlement. It is true, there is no caſe, where it is ſo held on a will; nor ever will be, where no more than is there ſtated, nor any intent to preſerve contingent remainders inſerted. The next clauſe of his declaration is applied to the deviſe of a legal eſtate. The next relates directly to the deviſe of a truſt; (and, I own, goes a great way) that the ſame words in a will, which at

(o) 1 Brown, 338.

law would create an eſtate tail, ought to be conſtrued by this court, when they fall under a truſt and are to be carried into further execution, (as in the preſent caſe) ſo as to carry an equitable intail. The propoſition includes all truſts, as well executory as executed; the words being *which are to be carried into further execution;* and in ſaying that the court muſt adhere to the words of the will, notwithſtanding the truſt is to be carried into further execution, I fear, he was not ſo fully informed of precedents; all the authorities I have cited, being directly contrary thereto. At the concluſion of the general argument of this declaration is a very remarkable clauſe: that admitting the debts paid, the ſame conſtruction ought to be, as if originally no truſt: but I cannot ſee how that ſubſequent fact could vary the conſtruction of the will; but if it could, it is different from the preſent; the eſtate not being ſold, nor truſt performed. I dwell the longer on this declaration, as it has been much relied on; and muſt add a circumſtance within my own private knowledge: that Lord *Harcourt*, after he was out of office, expreſſed himſelf ſtrongly againſt declaring general reaſonings in this court, which might affect other caſes here; to which I wiſh he
(152) had adhered in this caſe. But to add force to the precedent it is ſaid, this caſe was again reheard by Lord *Cowper*, who was convinced, and approved of Lord *Harcourt*'s reaſons; but that is a miſtake, and ſecond rehearings are contrary to the general rule of this court. Therefore it muſt only have been ſaid *obiter:* and after all, the reverſal of that decree may be maintained without the aid of that detail of general reaſons, and plainly differs from the preſent caſe.

As to the difference taken between truſts executed and executory.

As to the ſecond objection, (p) of the difference between truſts executed and executory; no one is more unwilling than I am *quieta movere*. But this diſtinction never has been eſtabliſhed by any direct reſolution, though ſaid *arguendo*; and was it to be examined to the bottom, it might ſound ſtrange, how it ſhould be eſtabliſhed. All truſts in notion of law are executory, and to be carried into execution here by *ſubpœna* according to the old books. At common law every uſe was a truſt; the ſtatute conjoined the legal eſtate; thereto, and therefore a truſt executed in his ſtrictneſs a legal eſtate; ſo that to bring a caſe within the juriſdiction of *Chancery*, it muſt be executory. The firſt eſſential part therefore of a truſt is, that the truſtee is to

(p) 2 Vol. 323.

to convey the eſtate ſome time or other, whether the teſtator has directed it or not; which every teſtator is preſumed to know. Therefore a doubt may be reaſonably made, how there can be a difference, whether the teſtator has in words directed a conveyance or not: ſince the court takes notice, that the teſtator could not intend it ſhould always remain in truſtees. I have ſaid, this may be doubted of; and do not chuſe to carry it further out of deference to thoſe great men, who have relied on it. I have great deference for Lord *Talbot*'s opinion; but take his decree in Lady *Glenorchy*'s caſe to be ſo right as not to want the aid of the diſtinction there made. But how far did it amount to a poſitive opinion to bind him? The words are, that in truſt executed or immediate deviſe, it ought to be the ſame in law or equity; becauſe the teſtator did not ſuppoſe there would be any other conveyance, and therefore no other conveyance would be preſumed: but I have ſhewn that ſome time or other a conveyance muſt be made; which the teſtator is preſumed to know. If by the words *act executed*, is there meant *deed in the teſtator's life*, it is proper; but if only a deviſe to truſtees upon immediate truſt, without expreſsly directing a conveyance, I beg leave to doubt of it, and whether the court would not be bound to direct a conveyance in ſtrict ſettlement, as it was there in *Leonard* v. Lord *Suſſex*: but it appears in the end, that Lord *Talbot* formed no fixed opinion to bind himſelf; but only an inclination, if it was an immediate deviſe; and it appears, that he afterwards relaxed from it. For in *Withers* v. *Algood* he made the ſame conſtruction upon a truſt in a deed, wherein was no direction of conveyance, nor any thing to diſtinguiſh it from a truſt executed.

Tal. caſes 19.

(153)

I have now gone through the general reaſoning; but one thing in this caſe is particular and deciſive. I laid it down at firſt, and in this agree with the *Maſter of the Rolls*, that nothing ſince the death of the teſtator can vary the conſtruction of the will or the rights of the parties: but the determination muſt be the ſame, as if *Benjamin Bagſhaw* was now alive, and came to the court for a decree, in which caſe the ſurplus of the money ariſing by the ſale muſt have been decreed to be laid out in lands, one moiety to the uſe of *Benjamin Bagſhaw*, remainders over. Then the queſtion would have ariſen, whether a direction to preſerve contingent remainders ſhould be inſerted or not? If to be inſerted, then the next limitation of the uſe muſt have been to the firſt, *&c. ſon of Benjamin Bagſhaw* in tail male, remainder to the daughters in common; and not

not in the very words of the will; becauſe it would be abſurd and contradictory to preſerve contingent remainders, where there are none: as in *Papillon* v. *Voiſe*, where the words of Lord *King* are, that if the conveyance ſhould be in the words of the will, it would be blundering. Conſider then, whether it ought to have been left out; for then the conveyance muſt have been to *Benjamin Bagſhaw* for life, without impeachment of waſte; and after to the heirs of his body with other remainders over; which would give an immediate eſtate tail in poſſeſſion. In one or other of theſe, the conveyance muſt be; and taking which you will, the court muſt have departed from the words. The queſtion then is, whether the court ought to do that, to comply with the intention, or to contradict it? And I hold
1 *Ven.* 378. with Lord *Hale* in *Pibus* v. *Mitford*, that we ought to ſerve the intent, if we can, as the beſt expoſitor we can go by. But it is objected, that ſtill you muſt adhere to that, which would be the legal operation of the words of the limitation of a truſt, when reduced into a common law conveyance: but I deny that general propoſition, which I have diſproved from reaſon and authority. But for argument's ſake, admitting it, the court could not have done it here, by leaving out truſtees to preſerve, *&c.* without conveying to *Benjamin Bagſhaw* a different legal eſtate from that which the words of the will would have carried, if it had been a legal deviſe of land. In *Colſon* v. *Colſon* it was a deviſe of a legal eſtate, and the words nearly the ſame: and it was held, becauſe of the interpoſition of the remainder to truſtees, that it was an eſtate for life not merged in the deviſe to the heirs of the body: but an eſtate tail veſted in remainder. The conſequence of that opinion, if right, is, that if the court in framing a conveyance in the preſent caſe, had left out the deviſe to truſtees to preſerve, *&c.* the court would have given not only a different equitable, but alſo a different legal eſtate, from what the words in the will would have given; for by leaving it out, *Benjamin Bagſhaw* would have an immediate eſtate tail in poſſeſſion: but in the other caſe, an eſtate for life forfeitable. So that if the court ſhould direct a conveyance of this moiety to his uſe for life, and after to the heirs of his body, they
(154) would not only depart from the (q) words of the will, but alſo

(q) This caſe was determined agreeable to teſtator's intention, but contrary to the rule of law laid down in Shelley's caſe, viz. where an eſtate is given to the anceſtor, and alſo in any part of the ſame inſtrument to the heir, or heirs of the body, the eſtates unite; which rule was recognized afterwards by Lord Hardwicke, in Garth and Baldwin, 2 Vol. 646, and by Lord Thurlow, in Jones and Morgan, 1 Brown 206.

alſo from the legal effect thereof, and contradict the intent; which I cannot think myſelf warranted to do.

So much therefore of the laſt decree by the *Maſter of the Rolls*, as declared it an eſtate tail to *Benjamin Bagſhaw*, muſt be reverſed; and inſtead thereof, as all the particular limitations are by the event determined, one moiety of the clear ſurplus by ſale of the truſt eſtate, be paid to the defendant *Spencer*, heir at law to *Benjamin Aſhton*.

Butterfield *verſus* Butterfield, *November* 12, 1748. Caſe 79.

Lord Chancellor now delivered his opinion. Ante 133.

I Had no great doubt before: (r) and think it too remote a limitation of a perſonalty; (s) there being nothing to reſtrain it to heirs living at the death, for then it might take effect: ſo was it determined by me in Lord *G. Beauclerc* v. Miſs *Dormer*, 2 Atk. 308, and in another caſe: and by Sir *Joſeph Jekyl* in *Milward* v. *Milward*, in 1734.

The only objection is, that here is no gift, but only a direction to pay the intereſt to him for life: but that makes no difference; it being plainly given to the heirs of his body, and the profits being to him for life, it muſt neceſſarily veſt the whole intereſt and property to him. As in *Co. Lit.* a deviſe of the profits of lands to *A.* for life, and afterward, the ſame lands to the heirs of his body is an eſtate tail in poſſeſſion; *profits* being the ſame as the lands themſelves.

Deviſe of the profits of lands for life, and afterward the land to the heirs of his body; an eſtate tail in poſſeſſion.

The decree therefore muſt be reverſed; otherwiſe I ſhould go farther than any caſe has gone, and occaſion great inconvenience.

Buxton

(r) 1 Brown 170, 188. Fearne, 341. 2 Brown, 33. Ante 9.

(s) It is now ſettled, that a limitation of a perſonal eſtate in tail, veſts the whole in the firſt taker. 2 Wms. 290. Vin. Vol. 8, 451. Daw, Pitt and Weſtern, reported in Fearn 347. Prec. Chan. 431, the contrary doctrine was formerly held, and that the firſt taker had only the uſe of the deviſe for life. 1 Wms. 1. 1 Eq. Ab. 301. 2 Vern. 245, 332.

Caſe 80. Buxton *verſus* Snee, *November* 15, 1748.

Plaintiff employed by the maſter of a ſhip in repairing it. No lien upon the ſhip or the money ariſing by ſale of it: unleſs done upon the voyage.

THE demand by the plaintiff was for work done in repairing a ſhip (t).

The defendants were part-owners, or their repreſentatives, who received the benefit thereof: and notwithſtanding inſiſted, that they ſhould not make a ſatisfaction.

LORD CHANCELLOR.

This is undoubtedly a harſh defence. (u) Their having received the benefit is not ſufficient to make them liable; for the court will not do ſo, if the court cannot come at it by way of contract or conſequential equity.

(155)

Queſtion whether the part-owners who received the benefit are perſonally liable. Poſt. *Samſun* v. *Braginton*, *May* 15, 1750.

The queſtions on this caſe are two. Firſt, whether the part-owners by the employment of the plaintiff, either by the maſter or the huſband, are become perſonally liable for the debt created, and contracted for the repairs? The ſecond, ſuppoſing they are not, whether the ſhip itſelf has contracted a lien by the *Admiralty* law allowed here: and then whether the money ariſing by the ſale is anſwerable to the plaintiff?

I will conſider the laſt queſtion firſt, and am of opinion, that the plaintiff is not intitled to follow the money into the hands of the defendants. Certainly, by the *maritime* law, the maſter has power to hypothecate both ſhip and cargo for repairs, *&c.* during the voyage; which ariſes from his authority as maſter, and the neceſſity thereof during the voyage; without which both ſhip and cargo would periſh: therefore both that, and the law of this country, admit ſuch a power. But it is different, where the ſhip is in port, *infra corpus comitatus*, and the contract for repairs, *&c.* made on land in *England*: then the rule of that law muſt prevail. I know no caſe, where the repairs, *&c.* whether it was by part-owners or ſole owner, maſter or huſbands, have been held a charge or lien on the

(t) 1 Salk. 34. 1 Stra. 695. 1 Atk. 234. Douglas, 97. Cowper, 636.

(u) It has been held that where a Captain contracts for the uſe of the ſhip, credit is given him in reſpect of his contract; alſo to the owners, as the contract is on their account, and the creditor has a ſpecific lien on the ſhip; alſo a Captain not perſonally contracting is not anſwerable perſonally for the ſhip's neceſſaries. Per Lord Mansfield, in Farmer and Davies, Hill 26 Geo. 3. B. R. reported by Durnford and Eaſt.

the body of the ſhip. *Watkinſon* v. *Barnardiſton*, 2 *Wms.* 367, being a direct authority to the contrary: and if the ſhip in the river *infra corpus comitatus* ſhould be proceeded againſt and ſtopped for ſuch debt, the courts of law would iſſue a prohibition; the contract being at land, and not ariſing from neceſſity. If therefore the body of the ſhip is not liable or hypothecated, how can the money ariſing by ſale be affected or followed; the one being conſequential of the other; So that the foundation of an equity's ariſing for the plaintiff fails. But it is ſaid, that ſounds harſh in a court of equity; for even admitting there is no lien on the body of the ſhip, yet the defendants having received the benefit ſhould make ſatisfaction: but that follows not as an equitable conſequence; for ſuppoſe the owner of an houſe lays out a great ſum of money in repairs; upon its deſcending to his heir at law he cannot be affected with the debt for theſe repairs, although he receives the benefit; for though that be the law of *Holland*, that it is a lien on the houſe, it is not ſo here; for if whoever receives a caſual benefit, ſhould be liable to make ſatisfaction, it would extend to ſeveral caſes where it ought not. The demand then muſt reſt on the firſt queſtion: whether the defendants, or thoſe in whoſe place they ſtand, are perſonally liable for the debt; of which I doubt; but will give the plaintiff all the aſſiſtance I can; for it is juſt, that if he can come at it, he ought. Undoubtedly in general, whoever contracts with another, as factor or agent for a third perſon, it will bind his principal; and there is an election, as in the caſe of *Blackwell-Hall*, and ſeveral other factors, to bring an action againſt either: and there are ſeveral caſes, where an action may be brought againſt a principal, though not named at the time of the contract. As among the *Brokers*, who will not be allowed as witneſſes to prove the the contract, and that it was made for the principal, though they were not named. It is no anſwer therefore to ſay, that the part-owners are not named. (156)

Then how far the act of the maſter can create an *Aſſumpſit* between the plaintiff and the part-owners. Had it been in the courſe of the voyage, it would have been another conſideration: but here it ſeems the maſter did not act as agent for the part-owners, but the huſband's. It is true that is in the anſwer under the words *heard and believe*; but not being replied to, it muſt be taken as evidence, becauſe no opportunity is given to prove it.

Then

Then the queſtion, which is very material, and in reſpect of which I am not ſufficiently informed of the courſe of trade, is upon the huſband: whether the part-owners are bound by the contract with the huſband; he being general agent? Suppoſing the principle, upon which the plaintiff goes, is true, the contract with the huſband is joint, and will ſurvive.

The moſt beneficial thing then, that can be done for him, is, to direct, that he be at liberty to bring an action againſt the ſurvivors: to reſtrain the defendants from pleading the ſtatute of limitations, or from inſiſting upon any diſcharge under a commiſſion of bankruptcy againſt one of them.

But let the bill be diſmiſſed, ſo far as it ſeeks any relief againſt the body of the ſhip, or the money ariſing by the ſale thereof.

Burnet *verſus* Mann, *November* 16, 1748.

Caſe 81.

Poſthumous brother of the half blood ſhall take under ſtat. of diſtribution.

ONE queſtion in this caſe was, whether a *poſthumous* brother of the half blood ſhould take, under the ſtatute of diſtribution, a ſhare of his inteſtate brother's perſonal eſtate.

LORD CHANCELLOR.

I cannot diſtinguiſh this from thoſe caſes where it is determined, that where an infant intitled to a perſonal eſtate dies inteſtate, his mother *enſient* with a child, that child ſhould have a diſtributive ſhare of his brother's eſtate, as one of the next of kin, and *in rerum natura* at his death; *Wallis* v. *Hudſon*, *Barnard.* for the general rule is, that they are conſidered *in eſſe* for their benefit, not for their prejudice. Thus in the caſe of a poſthumous child of the whole blood: this queſtion is of the half blood; and it has been determined, that as to the diſtribution of inteſtate eſtates, that makes no difference. So it muſt be here. If indeed it was to go to children born at any diſtance of
(157) time, ſo as to cauſe an inconvenience by ſuſpending the diſtribution, or to cauſe a taking back again, it might be an objection: but that cannot happen, becauſe the child muſt be in *rerum naturâ* at the death of the inteſtate brother, whoſe eſtate is in queſtion; but at the utmoſt it cannot be carried beyond the year, in which a diſtribution is to be made.

Another queſtion was as to the validity of an appointment, under a power given to huſband and wife, and the ſurvivor over a reverſionary intereſt after their death, to be by any writing under the hand and ſeal in the preſence of two witneſſes. The wife after huſband's death marries again, and during coverture appoints by will under hand, *&c.*

Appointment by will by a feme covert purſuant to a power.

And that an execution of a power by a wife is allowed, was cited Lady *Roſcommon* v. Major *Fouke*, in the *Houſe of Lords*; although there it was to execute after a power of revocation by any writing or deed.

Againſt this it was urged, that a writing in form of a will was a defective inſtrument here; for that it was not intended to be executed by will, but by ſome inſtrument in lifetime; becauſe to be executed jointly: and then when to be executed by the ſurvivor, it ſhould be by the ſame inſtrument.

LORD CHANCELLOR.

There are ſeveral caſes, where, when a power is reſerved to be executed as here, a will purſuing the requiſites has been held a writing within that power; and therefore in ſome inſtances where ſuch a power to a feme covert over a perſonalty is executed by her, by will proved in the *Eccleſiaſtical court*: I have ordered it to ſtand over, that it may be proved to be executed according to the requiſites in the power: nor could it be intended in this caſe, that the inſtrument ſhould take effect in life of the parties; it being over the reverſionary intereſt. Suppoſe ſhe by an inſtrument, not in form of a will, had appointed expreſsly after her death; it would be good. Then it is no objection, that ſhe has done it by an inſtrument, which ſpeaks, that it is to take effect after her death: and the gift appears to be the ſubject of the power; for there are ſeveral caſes, where it is not neceſſary to refer to the power, if the acts done are ſufficient and warranted.

Roach *verſus* Garvan, *November* 16, 1748. Caſe 82.

MAJOR *Roach* having two daughters, one born at *Fort St. George* in the *Eaſt Indies*, the other at *St.* ——— near it, ſent them to *France* for their education, and put them into a nunnery. Mr. *Quan*, one of the perſons in whoſe care they were left, and a banker at *Paris*, married

married the eldeſt, who was then about the age of eleven, (as appeared by the beſt evidence) to his ſon then not ſeventeen. Their fortune was in the power of this court; and their mother applied to *Lord Chancellor* for the guardianſhip; which was granted.

Out of her cuſtody the young ladies now petitioned to be taken, upon affidavits of her putting them to ſeparate boarding ſchools, and endeavouring to marry the younger to one *Sparry*; and to have ſome other proper perſon appointed to be guardian.

Quan petitioned for a decree for cohabitation with his wife; and to have ſome money out of the bank.

And the mother petitioned for a reimburſement of her expences in bringing them over.

After a long and full hearing *Lord Chancellor* delivered his opinion.

The reaſon I let this cauſe run out to ſuch a length, was, to give ſeveral perſons, upon whom aſperſions were thrown, an opportunity of clearing themſelves: and it is certainly a melancholy conſideration to ſee ſo many private converſations and accidental circumſtances made publick, which were not intended to be ſo. Theſe ladies were ſubjects of *Great Britain*; for though one of them was born at a place, which it does not appear, whether it belongs to the king of *Portugal*, this crown, or the *Great Mogul*; yet being born of a natural ſubject, the ſtatute of *Queen Anne* makes her a natural ſubject; nor can naturalization by a foreign prince change their allegiance, as has been ſaid. The reaſon I refuſed to ſend over money for their maintenance was, that I ſhould thereby have tranſgreſſed the ſtatute, which makes it criminal in ſuch caſes: and alſo with a view to bring them over. I appointed the mother guardian; who is properly ſo by nature and nurture, where there is no teſtamentary guardian. The proper age to apply to remove a parent from being guardian in a male is fourteen, in a female, twelve: but the court will never do it, without ſome miſbehaviour in the parent: the mother ought not to have ſent them to boarding ſchools at ſuch an age; but ſhould have applied to the court to know where to place them. In caſe of minors the court chiefly regards their marriage; and the proper thing to be conſidered of in this guardianſhip is the benefit and advantage

advantage of the infants: and it cannot be convenient for them to continue with the mother longer, becauſe of the quarrels which have been. The moſt proper perſon (as is admitted by the *counſel* of all ſides, abſtracted from their own clients) is Mr. *Potter*.

But the marriage of the elder, and *Quan*'s petition thereupon, brings a moſt extraordinary caſe before the court: their perſons and fortunes being under the care of the court (which was very happy for them) the marriage was in general a contempt of the court: but although *Quan* himſelf, by reaſon of his tender years at the time, was not blame worthy; in the father it was a moſt perfidious act, and breach of truſt; and though a foreigner ſhould be the contriver of ſuch a match, if I afterward got him here, I would puniſh him. Then as to the fact of the marriage, if good, the court will take care, that the huſband makes a ſuitable proviſion; but the moſt material conſideration is as to the validity thereof: it has been argued to be valid from being eſtabliſhed by the ſentence of a court in *France*, having proper juriſdiction. And it is true, that if ſo, it is concluſive, whether in a foreign court or not, from the law of nations in ſuch caſes: otherwiſe the rights of mankind would be very precarious and uncertain. But the queſtion is, whether this is a proper ſentence, in a proper cauſe, and between proper parties? Of which it is impoſſible to judge, without looking farther into the proceedings; this being rather the execution of the ſentence, than the ſentence itſelf. Where a marriage is in fact had, or in a contract *in præſenti*, or in a ſuit for reſtitution of conjugal rights; a ſentence in the *Eccleſiaſtical court* (unleſs there be colluſion, which will overturn the whole) will be concluſive and bind all: but not if given in a collateral ſuit, as for a criminal action; for it will only bind the rights of the marriage in the three caſes above. This was in a criminal court in the *Chaſtelet* in *Paris*; and it is ſtrange, if they have no other judicature in *France* for marriage than a criminal court: But the great point is from the ſubſequent acts; which are ſaid by her aſſent to have made it good, ſuppoſing the ſentence not good, and that ſhe was not, at the time of marriage, of the age of conſent. Cohabitation is indeed evidence thereof, unleſs it was under reſtraint; but this is a conſideration for another court; and not a matter ſtrictly for me to determine, who do not ſit as a judge in an *Eccleſiaſtical court*, to decree a reſtitution of conjugal rights. Suppoſe the huſband had brought an *Habeas Corpus* or *Homine replegiando*, which he may

(159)

Marriage in foreign court concluſive by the law of nations.

In what caſes a ſentence in court eccleſiaſtical will bind the rights of marriage.

may do for his wife: courts at law, who can only take care of the parties, would have left it to the proper remedy in the proper court. Then much less will I order any money out of the bank to be given him.

Appointment of guardians resulted back to the court after dissolution of the court of wards.

As to that part of the petition, which prays an appointment of a proper person: after the dissolution of the *court of wards*, (which was derived out of this court) though the rights of the crown were determined by the abolition thereof, it resulted back to this court, for the advantage of the infants to appoint guardians. But the question is, whether the court can do it in a case, where there is so much evidence of a marriage; for after a marriage there is no precedent, where the court has done it: and I shall be very unwilling to make one. (y) Nor on the other hand will the court determine a guardianship, or discharge any order made for a guardian, because of a marriage; of which likewise there is no precedent: but how to let it stand here, considering the mother's misbehaviour, is the question? But I may without disturbing the order, by which she was appointed guardian, make an order upon her, to let them be placed with Mr. *Potter*; which the court has often done. The court sometimes, though rarely, removes a testamentary guardian; but if he behaves not to the satisfaction of the court, orders regulating his conduct are frequently made upon him: as in the case of Lord *Noel* v. *Somerset*, and by me in the case of *Knellers*, which shall be done here; with the usual directions, not to marry without the leave of the court: and that *Sparry*, *&c.* neither write to or visit them: but this without prejudice to *Quan*'s claim.

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Guardian will not be appointed after a marriage; Nor discharged because of a marriage. But without discharging guardians orders regulating their conduct may be made.

Liberal allowance for maintenance where a guardian or father is in distressed circumstances.

As to the mother's petition: (z) she must be allowed those expences, and the daughters having consented to a very reasonable offer of part of their maintenance for her support; although I cannot come at it, by their consent, they being infants; yet I may by the liberality, which the court uses on such occasions; as has been done even in the case of a father in distressed circumstances, when a sum of money has been left to his infant son, by a collateral relation; the court has there given a liberal maintenance for his

(y) Guardianship of daughters determined by marriage, *secus* of sons. Ante, 91.

(z) Mother having married a second husband, not obliged to maintain the children by the first, but shall have an allowance from the interest of their fortunes. 1 Brown, 268. Where the parent is of ability, maintenance not allowed, tho' directed by the will. 1 Brown, 387.

his ſupport; but then it muſt appear to me, that the mother is in thoſe circumſtances.

Baker *verſus* Wind, *November* 19, 1748. Caſe 83.

THE father of the plaintiff mortgaged an eſtate to the defendant; and by articles they agreed, that upon being reimburſed what he advanced, and 50*l.* over, for ſuch improvements as he might poſſibly make, he ſhould reconvey: but this clauſe was not inſerted in the deed of conveyance, the mortgagor, upon account of his creditors, being willing it ſhould appear as a purchaſe; but by ſubſequent facts and agreements it appeared in proof, that the defendant admitted it to be a redeemable eſtate; and it had been referred to arbitrators; who, though they did not chuſe to make an award, yet were of opinion that he ſhould take the money, and give up the eſtate.

The mortgagor's ſon, within a year after he came of age, but twelve years after the tranſaction, brought this bill to redeem.

For defendant it was inſiſted, that he ſhould neither be redeemed, nor come to an account after ſo long a time. Citing *Cottrel* v. *Purchaſe*, *Tal. Caſ.* 61.

LORD CHANCELLOR.

This is the ſtrongeſt caſe that ever came before me, for the decreeing a redemption, where that redemption was controverted: and alſo to make the mortgagee, who oppoſed it, not only loſe, but pay coſts: there being ſuch a ſeries of tranſactions in which it was conſtantly admitted to be redeemable, as it clearly was. The not inſerting the clauſe in the deed was an impoſition upon the mortgagor; but the reaſon was, that he was in diſtreſs, and therefore turned it into the ſhape of a purchaſe; but ſtill he meant it as a ſecurity. The value of the eſtate does not appear; but if he, as a friend to the mortgagor, thought fit to take it as ſecurity, he did it with his eyes open; and the redemption cannot be prevented: and wherever the court finds ſuch a clauſe as this, it adheres to it ſtrictly, to prevent the equity of redemption from being intangled to the prejudice of the mortgagor. And the getting a further ſum

Where a clauſe of redemption in a ſeparate deed, court adheres to it ſtrictly to prevent the equity of redemption from being intangled to the prejudice of mortgagor.

Where mortgagee paid coſts on redemption.

ſum of 50*l.* inſerted upon a mere pretence, for whether he improved or not (which was in his election) he was to have the 50*l.* is an evidence of hardſhip put on him: then ſurely twelve years is not ſufficient to bar a redemption. But the preſent plaintiff was a minor all that time; which in caſes upon the ſtatute of limitations is always deducted; nor did it reſt as a thing undemanded. and the opinion of the referrees was the ſame, as would be decreed here; if ever therefore a mortgagee ought to pay coſts, it is in this caſe. Reſerve ſubſequent coſts till the account is taken.

Caſe 84. *Sir* Chaloner Ogle *verſus Repreſentatives of Admiral* Haddock, *November* 22, 1748.

Bill for an account and ſhare of prize money diſmiſſed.

THE bill was brought for a ſhare of prize money,

LORD CHANCELLOR.

I am ſorry this caſe is brought before the court, after an acquieſcence during the life of *Admiral Haddock*, and in a caſe ariſing merely from the bounty of the crown; wherein the queſtion is, whether the claimant ſhall take according to the intent of the crown in giving it, or upon the conſtruction of the words in contradiction to that intent. However, if there is a clear right in the plaintiff, whether it ariſes originally from bounty or from conſideration, he muſt prevail therein.

I ſhall conſider it under two heads: Firſt, in reſpect of the merits and mere right of the plaintiff as againſt the defendants. Secondly, in reſpect of the remedy he has purſued for it.

(162) As to the firſt, it depends on the ſeveral acts by the crown; the proclamation *June* 19, 1740, the declaration *June* 18, 1741, and the proclamation *June* 14, 1744. I ſhall apply my opinion and reaſoning to the repriſals taken upon the firſt rupture with *Spain*, before the declaration of war publiſhed; becauſe it muſt be admitted, that as to the produce of them, the right of the officers and ſeamen ariſes merely from the *King*'s bounty, and has no relation to the act of 13 *Geo.* 2. not being in the nature of an execution of a power, or the ſame as if inſerted in the original act of parliament.

The

The two firſt inſtruments muſt be taken together in the words. The firſt recites the act of 13 *Geo.* 2. and then directs a diviſion of the prizes; and it is remarkable, that in ſpeaking of the flag-officers ſhares, it ſtops ſhort: but in giving all the ſubſequent ſhares, it ſays to be equally divided among them. The ſecond directing a diſtribution of prizes taken before the war, the property of which was veſted in the *King* (and ſo of thoſe taken after the war, till given away) directs it to be paid to and among, *&c.* in the ſame manner and proportions as by the firſt. If then the firſt is taken into the ſecond, there will be no abſurdity in conſtruing this to proceed from the *King*'s bounty: that he intended, as to the ſhares of the other officers, *&c.* to bind himſelf, that it ſhould be equally divided: but as to the flag-officers, the proportions ſhould be left to his own judgment according to their merits; amounting to the ſame, as if the *King* at the head of his army ſaid, he gave the whole plunder to his officers and ſoldiers, he might give it according to the merits.

As to the third inſtrument 1744, the firſt queſtion is, whether the ſubject matter extends to the prizes taken under the general letters of repriſals before the war? The ſecond, ſuppoſing it does, whether thoſe words have in conſtruction any retroſpect? The third, if ſo, whether that retroſpect can affect the rights of the parties?

As to the firſt, I am of opinion, it does extend thereto: the intent of it was to prevent diſputes, and to ſettle the rights of the prizes. If this is to be conſidered as an explanatory proclamation upon that in 1740, it conſequently is ſo of the other in 1741, which refers to that in 1740, and amounts to the taking in the words thereof. But it is ſaid, theſe prizes taken before war declared are not taken from the *enemy:* that is a refined diſtinction; it is true in general, the letters of *marque* and repriſal make not *bellum juſtum*, or a formal war, between princes: but of late the wars in *England* have generally begun in that manner. And it is a lower degree and kind of war; for theſe general letters are for general injuries to the *King*'s ſubjects, which is the cauſe of war; and differs from particular letters of *marque*; under which the prizes taken become the property of the perſon to whom they are granted: theſe under the general, accrue to the crown; which is a proof, that it is a kind of war. But it means *now* our enemies; ſo that it is in effect the ſame. The ſubject matter then

of the laſt proclamation includes the prizes before the declaration of the war with *Spain*.

But ſecondly, if it has not a retroſpect, it will not take in the prizes taken either before or after the declaration, before the iſſuing the proclamation. I am of opinion, it is ſufficient. Was it to extend to future caſes only, why are the words *have been* mentioned, as well as *ſhall be?* It is alſo to explain and ſettle; and all explanatory laws relate to precedent caſes; and it is in all caſes of prizes taken; which, as the word *begotten*, means *taken* or to be *taken*.

As to the third: whether they can have a *retroſpective* effect, that is, operate in the caſes of prizes taken before the proclamation iſſued; it being ſaid, that the right was veſted: if the plaintiff could make out that right by the firſt declaration, it is out of the *King's* power to ſettle the proportions, or alter it: but that depends on the reaſoning above; the *King* not having excluded himſelf from declaring the proportions.

The remedy at law againſt the agents of captures.

Then as to the remedy: (a) there is no ground to come here for an account, the ſum being certain; and therefore no neceſſity to decree for the plaintiff, if his right was ſtronger; being a mere legal right, which ſhould be recovered at law; for if it was a right veſted, which could not be varied by the proclamations, the determinations in the courts of law have been, that the aſſignee may maintain an action againſt the agents of the captures, for money had and received to their uſe. Againſt the executor of Admiral *Haddock* the plaintiff cannot come, for he received it not for the uſe of the plaintiff; but againſt the agents, for paying it to a wrong hand.

The bill therefore muſt be diſmiſſed: but not ſo clear as to give coſts. But I hope, this will not be followed with other caſes of this kind, where there is an acquieſcence, and taking under the *King*'s bounty.

Caſe 85. Allen *verſus* Papworth, *November* 23, 1748.

Wife may by bill with her huſband appoint her ſeparate eſtate for his debts.

IN this cauſe Lord *Chancellor* (b) held that if a *feme covert* having power to receive the profits of an eſtate to her ſeparate uſe, and to appoint them as ſhe pleaſed, (c) brings

(a) 2 Vol. 312. (b) 2 Vol. 191.
(c) Such bill reckoned the bill of the huſband. 2 vol. 666.

brings a bill jointly with her husband for an account, and submitting that the profits should be applied to the payment of the husband's debts; for which a decree passes: that bill, to which she was made party without collusion, is as much an execution of her power as an actual appointment would have been; and the profits shall be bound by the decree.

And the bill being properly brought by husband and wife, when no other person was intitled, the account taken shall be binding on any contingent remainder man, when his title afterward vests: nor shall he open it, unless fraud or errors are shewn therein; for thereby accounts upon mortgages, to which all, who could claim the equity of redemption, were parties would often be infinite: although if a reasonable objection be made against it, the court will so far open it. But the court will only give leave to surcharge and falsify this account; which often happens upon settlements, where there is tenant for life with limitations in remainder, upon a bill for an account, when none but tenant for life is in being, a child afterward coming in *esse* shall only have liberty to surcharge or falsify, if no fraud. (164)

Account taken where only tenant for life in being a contingent remainder man coming afterward *in esse* shall only surcharge and falsify; unless fraud. So on account on mortgages where all who could claim the equity of redemption were parties.

Wortley *versus* Pit, *November* 23, 1748. Case 68.

AGREEMENT in consideration of 2000*l.* lent by the plaintiff, with a bond and condition, that if the defendant within a year paid 200*l.* and the principal, or 250*l.* *per ann.* during the life of the defendant, then, &c. (d)

2000*l.* lent on condition to pay in a year 200*l.* and the principal, or 250*l.* *per ann.* during borrower's life: not an usurious contract.

To the plaintiff's demand on the latter part of the agreement, for nonpayment of the annuity, or securing it out of land, as by the agreement obliged, the defendant pleaded the statute of *usury* in bar; the money being to be paid within a year, together with the principal. To this plea, two objections were taken; one as to the form; the other to the merits.

Master of the Rolls, for *Lord Chancellor*.

As to the first, his honour held, that the plea was not, strictly speaking, right in point of form; for there should have been an averment, that this was above the rate of common interest.

(d) 2 Vol 142.

But he did not found his determination on that, for ſuppoſing it rightly pleaded, the queſtion was, whether the demand was within the ſtatute of uſury? and he was of opinion, it was not; although he was very unwilling to favour uſurious contracts, or to encourage the getting out of the ſtatute. Had it been, that the principal ſhould be paid within a year together with the annuity, it would have been another conſideration. But this was all contingency; the defendant not being obliged to pay it then: and the annuity payable only during his own life, and then the money to be loſt, and not repaid. Certainly if the borrower of money only agrees to pay an annuity determinable as this is, it is not an uſurious contract; unleſs it was upon a contingency or condition impoſſible, or ſo remote as to induce the court to give it another conſideration. But it is not ſo here: the whole being to be loſt on
(165) the death of the defendant, is different therefore from the caſe in *Bro. Ab.* And the plea muſt be over-ruled.

Caſe 87. Stones *verſus* Heurtly, *November* 25, 1748.

Deviſe to truſtees by ſale or mortgage to pay debts, the remainder to go and be equally divided among three children and the ſurvivor of them and their heirs for ever: a tenancy in common.

JOHN STONES having two ſons and two daughters, (e) and being ſeiſed of an eſtate in reverſion, expectant on the death of his aunt *Mawhood*, and alſo of an eſtate in poſſeſſion of leſs value; deviſed to truſtees and their heirs the lands in queſtion, upon truſt, that they ſhould, by ſale or mortgage of any part, raiſe ſo much to pay all his debts, as his perſonal eſtate ſhould not extend to; making the ſame liable thereto: the remainder of all his eſtate to go and be equally divided amongſt his three younger children, *D. F.* and *M.* and the ſurvivor of them, and their heirs for ever: making his wife guardian of all his children, and directing, that ſhe ſhould maintain and educate them out of the profits and rents of their ſeveral eſtates and fortunes, given them by the will and ſettlement.

They all ſurvive the teſtator.

And for plaintiffs it was contended, that they took jointly by force of the word *ſurvivor*, which ſhould not be controuled by the precedent word. 2 *Rol. Ab.* 90. *Sti.* 211. and *Clerk* v. *Clerk.* 2 *Ver.* 323.

To which it was anſwered, that the caſes in *Rol.* and *Sti.* were old, and before it was ſettled, that the words *equally*

(e) Ante 13.

equally to be divided ſhould mean a tenancy in common; for in grants and feoffments they made no alteration; being only the legal conſequence of a joint eſtate, and no more than what the parties themſelves might do. But after the ſtatute of *Wills*, and the rule that the intent ſhould be obſerved, notwithſtanding unapt words, the conſtruction came to be, that the teſtator meant ſomething more, and intended a tenancy in common; which the courts were induced to infer from its being unnatural to ſuppoſe, he meant to diſinherit the poſterity of thoſe dying firſt, and that he would ſtartle at ſuch a queſtion put to him. In wills therefore, the courts have been *aſtuti* to conſtrue *ſurviorſhip* into ſome other meaning than a jointenancy, unleſs the intention was plain, that the ſurvivor ſhould take the whole: and in late caſes have laid hold of ſome particular time to give the word *ſurvivor* a ſenſe. As in *Stringer* v. *Philips*, it was pinned down to the death of the teſtator, when the diviſion ſhould be made: in *Haws* v. *Haws*, *Ante* 13 *T. T.* 1747, it was tied down to the dying under twenty-one. In *Bliſſet* v. *Cranwel*, *Sal.* 226, thoſe old caſes are taken notice of, and that the inheritance there, being fixed in the ſurvivor, ſhewed plainly, they were jointenants; but in this caſe it is not to the heirs of the ſurvivor. In the preſent caſe, it may be reſtrained to the time of the death of the teſtator, or Mrs. *Mawhood*: and the direction for the maintenance ſhews, the teſtator conſidered them as having ſeveral eſtates. (166)

Replied: that an implied diviſion ſhall not controul expreſs words of ſurvivorſhip; *Stringer* v. *Philips* in particular, a caſe being there put by the teſtator where the ſurvivorſhip could not take place. In *Haws* v. *Haws* there were negative words; and it depended on a reaſon, which holds not here. *Conceſſit cur.* The teſtator's death was not a probable time to have in view, nor the time when it was to be divided: as then the truſt muſt wait till the death of Mrs. *Mawhood.* The reaſon of uſing the word *ſeveral* is, that the guardianſhip is alſo of the elder ſon, who had an eſtate by the ſettlement diſtinct from the other two eſtates. Ante 15.

LORD CHANCELLOR.

To make a conſtruction of this will, the circumſtances of the family and the eſtate of the teſtator muſt be taken into conſideration. His intent plainly was in this deviſe to make a paternal proviſion in nature of portions for theſe three

three younger children. I am of opinion, that they take as tenants in common.

Two things in general are to be obſerved in deviſes of this kind.

The law formerly favourable to jointenancies.

Firſt, antiently, and before the great alteration in the law by the abolition of tenures, courts of law were very favourable to the joint-tenancies, to prevent the ſplitting of tenures and ſervices: but they have ſince very much gone off from that, and endeavoured as much as poſſible to conſtrue it a tenancy in common, from the inconveniencies of conſtruing it joint: and from that time allowances have been given to the words (f) *equally to be divided* to make a tenancy in common: although in grants to this day they will not. But courts of equity have long before been favourable to tenancies in common, wherever they could lay hold of any words to conſtrue it ſo, from its being a greater equality, a better proviſion, and preventing eſtates from going by accident contrary to the intent.

Secondly, that both courts of law and equity have endeavoured to conſtrue it in common, when the deviſe is for children and their poſterity by way of portions; who would be diſinherited by a ſurvivorſhip; unleſs they did an *act* to ſever the jointenancy; but this requires time and attention; for they muſt live till twenty-one to do it.

I am of opinion upon the reaſon of the thing and the principal authority, that the words *equally to be divided*, as they ſtand here, ought to prevail. It may be objected, that
(167) there might be a ſeverance: but they were very young; and two of them were daughters. If they married at eighteen, what proviſion could the huſband rely on? for if ſhe died before twenty-one, it would go to the ſurvivors; and the children, if any, be ſtripped of all. For the defendants, it is endeavoured to make a particular ſurvivorſhip, to anſwer the intent, and yet to give the words ſome force: according to the rule, that all the words ſhall have a reaſonable meaning put on them, if poſſible. Firſt, that it ſhould refer to a ſurviving the teſtator; and if that could prevail, it might be reaſonable as to the intent: but there are not words in the will to confine it ſo, and it is dangerous

(f) In caſes of wills, theſe words make a tenancy in common, 1 Atk. 493, 494. 2 Atk. 122. 3 Atk. 525. and alſo in deeds which operate from the ſtatute of Uſes, 2 vol. 252, 371. 1 Wilſ. 341. 1 Pr. Wm. 14. Secus in Common Law Conveyances, 2 vol. 257.

rous, where the word *ſurvivor* is uſed, to conſtrue it a ſurviving the teſtator, without words indicating ſuch intent, when probably he meant a ſurvivorſhip among themſelves. Secondly, that it ſhould refer to a ſurviving Mrs. *Mawhood*: but neither will that conſtruction ſerve; for it will be followed with conſequences not anſwering the intention of the teſtator; making this whole deviſe to be ſuſpended till the death of Mrs. *Mawhood*, nothing paſſing till then: whereas the intention was, that it ſhould veſt in them immediately; and that this, which was the moſt valuable part of his eſtate, ſhould not be ſold as a reverſion, which would be a ſale to a diſadvantage. But it is like a deviſe of a reverſion, or mixed with an eſtate in poſſeſſion as here, to pay debts, and the reſidue to *J. S.* and his heirs; which will veſt in *J. S.* immediately, and not ſuſpend till the execution of the truſt and payment of the debts: therefore, though this conſtruction finds out a particular time, yet it does not anſwer the intent; which appears from the application of the profits of their ſeveral eſtates till twenty-one: and certainly they were to have the eſtate in poſſeſſion ſo applied till twenty-one. I reſort therefore to the determination of the three judges in *Bliſſet* v. *Cranwell*, of whom *Treby* and *Rokeby* were as good lawyers, as ever ſat in *Weſtminſter Hall*. The ground of their reſolution, which is right, is ſubſtantial, and not playing with words, but goes to the reaſon of things: and although, what *Juſtice Powell* ſays, is in general true, yet he founds himſelf upon a ſtrait-laced rule, with which he ſets out in the expoſition of wills. The reaſoning of the three judges is capable of the ſame conſtruction in the preſent caſe; the word *heirs* relating to all of them, and cannot be confined to a ſingle one, *viz.* to his or her *heirs*; the inheritance not being in the ſurvivor, as it would be if ſo, but in all of them: otherwiſe the inheritance would be in abeyance. The difference being, that in a grant *habendum* to *A.* and *B.* and their heirs, they are jointenants: but the inheritance is in both: but if the *habendum* be to *A.* and *B.* and the ſurvivor, and the heirs of ſuch ſurvivor, till the death of one, the inheritance is in abeyance. I do not know, whether the obſervation of the direction of the maintenance will go ſo far, as it is argued for the defendants; becauſe it is not confined to the will; for then it might be material.

Carter

Caſe 88. Carter *verſus* Carter, *November* 26, 1748.

Deviſe to truſtees from and immediately after determination of precedent eſtates, to uſe of *A.* in fee charged and with chargeable legacies, to be paid in 12 months: they run over all the precedent eſtates as well as the fee.

JOHN CARTER January 6, 1743, made his will deviſing the premiſes to truſtees, their heirs and aſſigns, to receive the rents and profits, and to pay them to his wife from time to time, as they became due, whether covert or ſole, to her ſole and ſeparate uſe, and that her receipts ſhould be a ſufficient diſcharge; and on further truſt to permit her to charge the premiſes with 200*l.* for ſuch uſe, *&c.* or perſon, *&c.* as ſhe, whether covert or ſole, ſhall by her laſt will, or any writing purporting a will, limit, direct, or appoint: and after her death to the uſe of a brother for life, and afterwards to another brother for life charged and chargeable as aforeſaid; and immediately from and after the determination of thoſe eſtates, to the uſe of his nephew, his heirs and aſſigns for ever, charged and chargeable with 100*l.* a-piece to his ſix nieces, to be paid to them reſpectively within twelve months after his deceaſe, and to be raiſed by the truſtees in like manner.

The teſtator being dead above twelve months, the nieces bring a bill for their legacies, and the queſtion was, what eſtate was charged therewith; whether only the limitation in fee to his nephew, or whether they run over all the eſtates for life as well as the fee?

LORD CHANCELLOR.

This is a matter of ſome doubt on the conſtruction of the will. It is oddly expreſſed: and there are words favouring the conſtruction reſtraining it to the laſt limitation in fee: and yet if a particular reaſon can be ſhewn on the intention of the teſtator and frame of the will for dividing this charge from the other, it may anſwer the objection for the defendant. The general rule is, that *charged and chargeable* runs over all the eſtate, as well particular, as the fee; as ſuppoſe, at the end he had ſaid, *charged with all my debts*; it would be a charge on all, and the direction within twelve months is an argument in favour of that intent; and ſhews, he intended theſe legacies ſhould take place in ſome way before the reverſion in fee to his nephew; and therefore they cannot be put on a level, as he has not ſaid it. One or other of theſe conſtructions muſt be: either that this is a charge on the whole inheritance, including the particular eſtates for life: or elſe on the reverſion in fee,

Charged and chargeable runs over all the particular eſtates, as well as the fee.

fee, and to be raiſed by ſale thereof, and if not ſold, they muſt carry intereſt from the year. Therefore I will order it to ſtand over, to find, if poſſible, from reading it over, ſome light from other clauſes in the will, for conſtruing the clauſe in queſtion.

Carter *verſus* Carter, *December* 5, 1748.

Caſe 89.

Lord *Chancellor* delivered his opinion.

I Find, that very little can be drawn from the peruſal of the will; therefore the queſtions muſt be principally on the conſtruction of the clauſe itſelf.

Taking the ſeveral parts of the deviſe together, I am of opinion, they are charge on, and ought to be raiſed out of, the whole eſtate; and not confined ſingly to the reverſion in fee. They are clearly raiſeable now; and therefore intereſt for them muſt be found; and if the eſtates for life are not chargeable, no intereſt can come out of the profits: therefore the reverſion muſt be ſold merely as a reverſion; for it will not bear a mortgage. It is not probable, that when the teſtator has charged and expreſsly directed to be paid within twelve months, they ſhould be raiſed by ſale of a reverſion expectant on three lives; but if he has done it, that muſt prevail. The defendant would confine *charged* and *chargeable* to the laſt deviſe of the remainder in fee, from the words *immediately from*, *&c.* but the general rule is, that the conſtruction muſt be made on the tenor of the whole will taken together: and it is not material in what order the clauſe is; the whole deviſe is compriſed under one ſet of deviſing words; all that follows, being only truſts declared on the firſt deviſe in fee, and no new deviſe. That charge is as properly put in at the end of the whole, if the teſtator meant it ſhould run over all, as in any other part. The meaning of dividing the charges was, that the legacies ſhould be abſolutely a charge; but the 200*l.* only contingent and uncertain; depending on her power; which, he did not intend, ſhould be a charge on her eſtate for life. It is ſaid, that it is not to be preſumed, that this was intended to be a diminution of her eſtate for life: but from reading over the will it appears, and that is the only material thing appearing from thence, that this is not the only proviſion made for the wife; ſhe having the perſonal and another real eſtate alſo in lieu of thirds.

Conſtruction to be made on the whole will.

Not material in what order the clauſe is.

Theſe

These legacies are therefore to be raiſed out of the eſtate in queſtion, with intereſt from a year after his death, at 4 *per cent.*

Caſe 90. Johnſon *verſus* Arnold, *December* 5, 1748.

Money to be conſidered as land to comply with intent of teſtator.

HENRY SEER by his will directs, that 4000*l.* in money ſhould be taken out of his eſtate to be raiſed by inſtalments of 500*l. per ann.* to be laid out in government ſecurities in the joint names of his executor and *George Johnſon*; ſubject to the payment of two annuities and a debt; and when the whole is ſo raiſed and fully paid, if (170) *George Johnſon* ſhould be willing and deſirous to have it laid out in lands, then he ſhall and may purchaſe therewith in the name of the executor and himſelf; the produce and profits of the ſaid lands and tenements to go to *George Johnſon* for life; and afterwards to his wife for life; and after their deceaſe, to the eldeſt ſon of *George Johnſon*, to be begotten upon her, that ſhall be then living: and if the ſaid *George Johnſon* ſhould die without ſuch iſſue male, then the profits of the ſaid lands to be equally divided among the daughters; and if the wife ſhould die without leaving any iſſue by *George Johnſon*, or any future huſband, then 1000*l.* and other legacies out of it to the preſent defendants; the remainder to be divided among ſuch as are his neareſt relations. But if they ſhould not purchaſe lands, it ſhould remain in government ſecurities, and be and enure to ſuch purpoſes as if lands had been purchaſed.

Upon a bill brought by *George Johnſon* it was contended, that it ſhould be conſidered as money, and the remainder too remote; that it was dependent upon his election, whether it ſhould be laid out in land or not; and that he had determined to have it in money, by a former bill brought by him two years after the teſtator's death, to have the 4000*l.* raiſed, *&c.* upon which a decree was made: that it was not unreaſonable to give a father power to exerciſe his diſcretion for himſelf and his family; and if it was only a power as to the time, it would have been given to the executors as well as him.

For defendant, it was ſaid, that in all events it ſhould be laid out in lands; but left to the election of the plaintiff to poſtpone or accelerate the purchaſe only: and that it

it was not material, that the words were not imperative on him to purchaſe; for in a will deſiring an executor to pay, it is looked on as a gift.

LORD CHANCELLOR.

This will is penned in an obſcure and blundering manner: and there is ſome difficulty in the conſtruction of it. But ſomething in reſpect of the intention is very plain. Firſt, that let the conſtruction of the limitations be what they will, theſe charges ſhould take place on failure of *George Johnſon* and his family. Next that, though not laid out in lands, the ſame perſons ſhould have it. Then I am of opinion, that the conſtruction for the defendant will beſt anſwer the intention, and conſiſtent enough with the words: though they are not abſolutely clear. The conſtruction for the plaintiff would be abſurd; putting it in his power to vary the rights of the parties, and to determine whether theſe limitations ſhould take effect to the prejudice of his family or not: and he might eventually by that means give all to himſelf. For if it was money, and he had a daughter, who died, (as in fact it happened) it would all go to him. Suppoſing he had an election; the bringing that bill would not determine it; for it was before the payment of the whole was completed; before which time it was not to be laid out in lands: and part of the relief then prayed ſhews, it was not then raiſed. (g) Deviſe of the profits of lands is a deviſe of the lands themſelves; and it was meant, that the eldeſt ſon ſhould have the inheritance. But if by accident theſe were all but eſtates for life, it is no objection againſt the charges claimed by the defendants, which would equally ariſe; and are charges on the reverſion in fee. It is truly ſaid for the plaintiff, that it is out of the teſtator's power to make money go as land, unleſs the court can conſider it as land: and to comply with the intention of the teſtator, it is reaſonable to expound this clauſe ſo, that he meant it as land: and it muſt be taken ſo throughout.

Deviſe of profits a deviſe of the land.

Bryant

(g) Ante 42.

Caſe 91. Bryant *verſus* Speke, *December* 6, 1748.

Legacies out of real eſtate carry one *per cent.* lower than the legal intereſt. *Con.* If out of perſonal.

Upon a queſtion what rate of intereſt legacies ſhould bear.

LORD CHANCELLOR ſaid, that the general rule is, that legacies out of real eſtate carry one *per cent.* lower than the legal intereſt; but if out of perſonal eſtate, becauſe of the higher intereſt of money than land, it ſhall carry the legal intereſt, unleſs particular circumſtances induce the court to vary therefrom: but for that, a ſpecial caſe muſt be made.

The reaſon of this is, that the *Eccleſiaſtical* court would give the legal intereſt on legacies out of perſonal eſtate, as thoſe in queſtion were; and the difference of the juriſdiction, in which they are ſued for, ſhall make no alteration.

Caſe 92. *Duke of* Leeds *verſus* Powell, *December* 7, 1748.

THE bill was brought for the arrears and growing payments of the rents of a manor (h) granted by the crown to the anceſtors of the plaintiff.

LORD CHANCELLOR.

Where a clear right to rent, but no remedy at law, as no demeſne lands on which to diſtrain, bill lies here for relief.

Two queſtions ariſe from this caſe: Firſt, whether the plaintiff is intitled to this rent, as one entire rent under a grant of K. *C.* 2. to Lord *Danby?* Secondly, whether under the circumſtances he is intitled to relief here; or to be left to his remedy at law?

(172)

But it ſeems that the lands muſt be indiſputably of greater value than the rent.

The firſt depends on this, (which will determine the whole) whether the rent reſerved on the grant by *King Charles* was one entire rent *de novo*, and then created; or as reſervation, by way of exception to the crown, of the ancient quit-rents payable by the tenants of this manor to the crown? and I am of opinion, that it is the firſt. A manor in notion of law conſiſts of demeſnes in the hands of

(h) Bill does not lie againſt ſeveral tenants of a manor, for quit rent, as there can be no iſſue between any two of the parties; but where many claim one right in one ſubject, ſuch a bill may be to put an end to litigation. 1 Brown 200.

of the lord, and ſervices. It is admitted on both ſides, there were no demeſnes of this manor; though there were ſervices. There may be a manor in reputation, though no demeſnes. The *King*'s grant is in the moſt general words poſſible; but the word *rents* is particularly mentioned: although without that the word *manor* would have done; ſo that the demeſnes, if any, would paſs to the grantee; and the ſervices alſo; conſiſting in quit rents, ſeigniory, rights, and caſualties; which, though they ſeldom happen, are to be taken into conſideration, when a manor is granted. Was this otherwiſe, the crown muſt have excepted them, and nothing would paſs to the grantee: and then the rule of law is, that an exception repealing a whole grant, and contrary thereto, is void — Where the *King* grants rent, or perhaps land and rent, reſerving thereout rent to his heirs and ſucceſſors, it is good; as the *King* may reſerve out of an incorporeal thing, and it may enure out of both: but in the caſe of a common perſon who cannot do ſo, it would all ariſe out of the corporeal.

A manor may be in reputation, though no demeſnes. Which paſs by the word *manor*.

Exception repealing a whole grant is void.

King may reſerve rent out of an incorporeal thing.

Then as to the remedy, the plaintiffs right being clear: and it is truly ſaid, that if he has remedy at law, he ſhould not come here; but he has none; for there are no demeſne lands, on which to diſtrain, and he is a mere grantee of the crown under the great ſeal, without the aid of an act of parliament; and can have no remedy againſt other lands, which is the prerogative of the crown, or againſt the perſon of the defendant, and is therefore ſubſtantially and materially in the ſame condition with a perſon bringing a bill on the uſage of payment, where he cannot diſtrain, becauſe the particular lands cannot be fixed on, from a confuſion of boundaries, *&c.* ſo that he cannot find out a fund for the diſtreſs: (i) in which caſe, although he has a legal title, the court will decree for him by way of aſſiſtance of his right. But the great difficulty is what ſort of decree to make; whether it ought to be perſonally againſt the defendant, without entering into an account of the profits he has received; for in the caſes where the court has decreed the arrears and growing payments, which is prayed here, they have been where indiſputably the lands were of greater value than the rents. But as there are no demeſnes here, or certain profits, but theſe quit-rents, the defendant might be charged beyond what

Where from confuſion of boundaries no remedy by diſtreſs, the court will relieve.

(i) If terre tenant confounds the boundaries to prevent a diſtreſs, the Lord will be intitled to a commiſſion. 1 Brown 201.

what he received; which would ſound harſh in a court of equity, to give a remedy to do a great injury: like the caſe, where one comes into a court of equity for a remedy for rent, and the land does not produce that rent. I will therefore take time to frame a decree.

(173) It was afterwards ſettled.

Note, The demurrer, for that the plaintiff has remedy at law, was over-ruled 17th of *March*, 1745.

For the plaintiff had been cited *Cook* v. *Smeed* in the *Exchequer*, which was a bill by a vicar, who had a penſion granted out of a rectory appropriate, the payment of which had been diſcontinued, againſt a purchaſer, who was decreed to pay the arrears even previous to the purchaſe, as well as the future payments; and affirmed in the *Houſe of Lords*.

Caſe 93. Lloyd *verſus* Baldwin, *December* 9, 1748.

Where purchaſer or mortgagee obliged to ſee to the application of the money: where not.

A Decree was made, and directions for a ſale or mortgage, with approbation of the maſter; and that the money raiſed thereby ſhould be applied for payment of the debts: and a report was made aſcertaining theſe very debts by ſchedule.

Inſtead of applying as the decree directed, it was mortgaged to the defendant; but upon recital of the bill and all the proceedings thereon, the money was paid to a truſtee named by the defendant, upon truſt to pay it over to the creditors; with covenant by the truſtee to the defendant.

For whom it was now inſiſted, that the eſtate was not liable in his hands to the demands of the plaintiffs: but that ſuppoſing it liable, it was only in default of payment by the truſtee; againſt whom the plaintiffs ſhould be firſt turned.

Lord Chancellor.

If the court ſhould not hold this eſtate in the hands of the mortgagee to be liable, it would be vain hereafter to make ſuch a decree for the payment of debts; for then any perſon might afterward purchaſe with full notice, pay the money, and the creditors go without any ſatisfaction. It is

is true, it is an eſtabliſhed doctrine, that on a truſt or deviſe for payment of debts in general, without a ſpecification of the debts in a ſchedule, a purchaſer would be indemnified, and not obliged to ſee to the application of the money, or look after the creditors; which is in ſupport of the truſt, that the eſtate may be ſold. But if there is ſuch a ſpecification or ſchedule, a purchaſer or mortgagee is bound to ſee the application of the purchaſe money. So where there is a decree, which reduces it to as much certainty as ſuch a ſpecification: for the purchaſer does not pay to the truſtees in ſuch caſes; but muſt ſee to the application, and take aſſignments from the creditors: otherwiſe the purchaſer applies to the court, and that the money ſhould be placed in the bank, and not taken out without notice to him; the reaſon of which is, that it is at his peril. (174)

As to the order in which he is liable; they cannot, by what they have done among themſelves, change the ſecurity of the creditors; for that is reverting things: he was the defendant's own truſtee; and poſſibly after ſatisfaction againſt the eſtate, the mortgagee may come againſt the truſtee, from whom he took covenants.

Cunningham *verſus* Moody. Caſe 94.

BY articles in conſideration of marriage, 500*l.* were agreed to be laid out in the purchaſe of freehold lands of inheritance, to the uſe of the huſband for life; remainder to truſtees during his life, to preſerve, *&c.* then to the wife for life; then to all and every child or children to be begotten by the huſband on her body, for ſuch eſtate, *&c.* proportion, *&c.* as the huſband and wife during their joint lives, by any writing under hand and ſeal, and atteſted, *&c.* ſhould appoint: in default of a joint appointment, then as the ſurvivor ſhould appoint: and in default of appointment, to be equally divided among the children, if more than one as tenants in common, with croſs remainders and benefit of ſurvivorſhip; if but one, then to that child and the heirs of the body; in default of ſuch iſſue, to the huſband, his heirs and aſſigns for ever. They

Money by marriage articles to be laid out in land, to uſes of huſband and wife for life, then to the children as they ſhould appoint; in default of appointment equally; if but one to that one in tail, reverſion to

huſband in fee. One daughter; the truſtee pays it to her and her huſband; ſhe not being *ſui juris*, nor ſeparately examined; the payment not ſufficient to make it conſidered as money, and ſiſter of the half-blood may claim the reverſion in fee from the father; but the huſband of the other ſiſter, who was tenant in tail, will be tenant by curtely.

The power of appointment puts not the inheritance in abeyance.

They had iſſue one daughter, who married the defendant: there was no appointment. The truſtee paid this 500*l.* to the defendant and his wife; who received it as money; for which they gave a releaſe, but upon recital of the articles.

The bill was brought by a daughter by a ſecond marriage, againſt the defendant, repreſentative of his wife, the daughter by the firſt marriage, for this 500*l.* which ſhould be conſidered as land; and that the reverſion in fee, veſting in the father, her half-ſiſter continuing tenant in tail only during her life, was never ſeized of that reverſion: the plaintiff muſt claim it as heir to her father, and is not to take it from her ſiſter, from whom, being of the half-blood, ſhe could not claim: like the caſe of *Poſſeſſio Fratris*, &c. A perſon claiming by deſcent after an eſtate tail, muſt make himſelf heir to the firſt purchaſer, if it is a remainder; or to the donor, if a reverſion; and not to an intermediate perſon to whom it deſcended; notwithſtanding that perſon might have done what he would with it: as the ſiſter, being tenant in tail, might here. *Kellow* v. *Rowden*, 3 *Mod.* and *Carth.* 126, and *Giffard* v. *Barber*, *November* 21, 1740, where Dr. *Carew* ſettled an eſtate on himſelf for life, with remainders to his ſons in tail, reverſion in fee to his own right heirs: one, ſeized
(175) of the eſtate tail, and the reverſion, confeſſed a judgment; the entail deſcended to others; and then the reverſion coming into poſſeſſion, the queſtion was, whether it was affected with the judgment; and that it was not, *Kellow* v. *Rowden* was inſiſted on, becauſe a reverſion in fee was not aſſets: but his lordſhip held, that it was liable to be granted, charged, or leaſed; and that a lien might be created on it by ſtatute or judgment: and that *Kellow* v. *Rowden* was not applicable, becauſe the queſtion turned on the manner of pleading.

For defendant: his wife having it in her power, even by fine, to bar the limitations, upon a bill brought by her, the court would have decreed the money to be paid to her; and therefore the truſtees voluntarily paying it to them, makes no alteration. That money to be laid out in land ſhould be conſidered as land, is but a fiction of a court of equity, and not an univerſal rule; for it may be deviſed by a will with two witneſſes: what is contended for, might be miſchievous; for it would be difficult to ſay, how long this ſhould continue, as it might go to ſeveral others in ſucceſſion.

LORD

LORD CHANCELLOR.

So it might in *Edwards* v. Lady *Warwick*.

For defendant: no ſuch intereſt veſted in the anceſtor of the plaintiff, as could deſcend to her; the reverſion in fee never veſting in the father, becauſe during his whole life, the inheritance, ſuppoſing a purchaſe made, was in abeyance; for as he might have limited it to any child in fee, and the proviſion over in default of appointment would be then out of the queſtion, it was a ſpringing uſe reſting in ſuſpence during his life: it was held by his *lordſhip* in the caſe of Lord *Conway*, *Auguſt* 1740, that ſuch a power to appoint prevented any thing from veſting during the father's life, ſo as to enable the plaintiff to claim from him by deſcent. And in this caſe, the father had no power to charge or alien, being only tenant for life of the whole; and his appointee would take it paramount to any ſuch alienation by him. But if it is to be conſidered as land, the defendant having had a child, will not be hurt by the lacheſs of the truſtee, but is intitled to be tenant by *courteſy*.

LORD CHANCELLOR.

I have no difficulty, unleſs on the authority of Lord *Conway*'s caſe, which I do not remember: my preſent thoughts are theſe.

Where money conſidered as land, and when not; and where decreed to be paid.

The firſt and fundamental queſtion, upon which all will turn is, whether this is to be conſidered as land or money? for if the latter, the plaintiff's claim is at an end: but clearly, according to all the rules, * it muſt be taken as land; as it certainly was at firſt, and after the marriage had, being bound by the articles: the acts done are not ſufficient to have it conſidered as money. (k) Upon a bill by tenant in fee, the court would decree it to be paid in money, becauſe he might immediately ſell the land, and turn it into money; and the old rule was, that the court would alſo decree it ſo upon a bill by tenant in tail, with remainders over. And thus it ſtood till the caſe of *Cotwall* v. *Shadwell*, 1 *Wms.* 471, 485, where Lord *Cowper* (176)

* 2 Brown's Chan. Cas. 56. 5 Brown's Parl. Cas. 269, even as to collateral heirs. 1 Wms. 110, 172. Prec. Ch. 400.

(k) 1 Wms. 130. 2 Wms. 173. Atk. 453. 3 Atk. 447.

held, the remainder man ſhould have his chance, as it could not be barred but by recovery, which required time, and would not direct it to be paid in money: and the accident of the death of tenant in tail in that caſe before a recovery, ſhewed the remainder man's intereſt in ſo glaring a light, that it has eſtabliſhed the precedent ever ſince. (l) But where the remainder can be barred by fine, the court will decree it in money: but here was tenant in tail, reverſion in fee in one moiety to herſelf; and therefore certainly if ſhe was *ſui juris*, and brought a bill for the money, a moiety would be decreed to be paid to her, the other moiety to be put out at intereſt, to go as the profits of the land would: but here ſhe was a *feme covert*; and then the rule is, that although ſhe had the reverſion in fee of the whole, it ſhould be laid out, unleſs ſome further act was done, by her coming into the court to be ſolely and ſeparately examined, analogous to the form of a fine at law; and then if ſhe declared her conſent to have it in money, without the influence of the huſband; the court would decree it ſo: if ſhe was in the country, and could not come, there would be an order in nature of a *dedimus poteſtatem* to examine her there, which would take up time: the payment of the money therefore to them, ſhe not being *ſui juris*, is not equal to a decree of this court; nor is the releaſe ſufficient to cauſe it to be taken otherwiſe than as land, not being equal to a fine, or ſole and ſeparate examination, declaring her free will; (m) nor can it change the equitable quality, this money has gained, of being conſidered as land.

Tenant by courteſy of money conſidered as land.

Next as to the conſequence of this. The firſt is, that, as ſhe would be tenant in tail of the land, and had the ſame intereſt in the money, (n) the huſband ſurviving is intitled to be tenant by *curteſy*, according to the caſe of *Sweetapple* v. *Bindon*, 2 *Ver.* 536, although the court does not give that indulgence in the caſe of dower.

Next as to the inheritance; and if the plaintiff muſt claim this reverſion in fee from her ſiſter, ſhe cannot have it; becauſe being but of half-blood to her, ſhe cannot be heir.

(l) In 3 Wms. 13, Lord King would not decree ſo, and ſaid he ought to regard the iſſue in tail as well as the remainder man, and leave him his chance, for a fine is a thing of time.

(m) Where a ſum of money is in the hands of one, without any other uſe but for himſelf, it will be eſteemed money and the heir cannot claim. 1 Brown, 238.

(n) There muſt be a ſeiſin in law or equity to intitle huſband to be tenant by the curteſy. Poſt, 307.

heir. But I am of opinion, that ſhe may claim it from her father, who took alſo an eſtate for life by the ſame ſettlement: ſo that according to the ordinary rules it veſted in him: and whoever takes afterward, muſt take through him. It is certain, that where no perſon is ſeen or known, in whom the inheritance can veſt, it may be in abeyance: as in a limitation to ſeveral perſons, and the ſurvivor, and the heirs of ſuch ſurvivor; becauſe it is uncertain who will be ſurvivor; but the freehold cannot, becauſe there muſt be a tenant to the *præcipe* always. The fee's being in abeyance has in ſome caſes occaſioned an act of parliament to remedy it; but here it was not ſo: nor does the power of appointment make any alteration therein, for the only effect thereof is, (o) that the fee, which was veſted, was thereby ſubject to be deveſted, if the whole was appointed: or if part, ſo much, as was not drawn out of the inheritance, ſtill remained in the father as part of the old fee. And there is no occaſion to put the inheritance in abeyance; which the court never does but from neceſſity, and will ſo mould it by opening the eſtate as in *Lewis Bowle*'s caſe and ſeveral others, as beſt to anſwer the purpoſes of the limitations. But if the appointment was not made, it remained undiſturbed.

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Where inheritance is in abeyance.

Then the queſtion, if it can be called one, is, whether this reverſion, ſo veſted in the father, can deſcend to the plaintiff, ſiſter of the half-blood? And I think it may, according to *Kellow* v. *Rowden* and other caſes; for where not clothed with poſſeſſion, it follows the rule of *poſſeſſio fratris, &c.* although it is not exactly the ſame caſe; and the determination in *Kellow* v. *Rowden* comes up to this. It was there held to be ſufficient to make himſelf heir to the perſon, in whom it firſt veſted, without mentioning the intermediate perſons who never had the actual poſſeſſion of the fee, but barely the reverſion; although they might have charged, conveyed, or aliened it: and the court never is ſorry to ſee this happen between brothers and ſiſters of the half-blood by the ſame father; it beſt anſwering the intention and rule of nature.

Poſſeſſio fratris, &c.

Plaintiff therefore is intitled to this money, which muſt be conſidered as land; but the defendant is intitled to it during life. But this not ſo clear a caſe as to give the plaintiff coſts out of the defendant's intereſt.

(o) 1 Wms. 516. Fearne, 275. 2 Roll Abr. 418.

Caſe 95. Ogle *verſus* Cook, *December* 10, 1748.

UPON a bill for eſtabliſhment of a will and performance of the truſt, it was objected, that only two of the witneſſes to the will were examined, and ſome account ought to be given, why the third was not: as that he could not be found, *&c.*

Lord Chancellor held it neceſſary to the eſtabliſhment of a will; for if after the decree the heir at law ſhould controvert it, the court would order an injunction: nor did
(178) he care to make a precedent to the contrary; for if this other witneſs was called, he might ſay ſomething material againſt it: and therefore ordered it to ſtand over till the third was examined.

Caſe 96. Willet *verſus* Sandford, *December* 12, 1748.

Poſt. Deviſe before the mortmain act of lands in truſt for a charity: codicil after the act deviſing the ſame lands to ſame truſtees and to two others to ſame charity, making alteration in other parts of the will, confirming the reſt and declaring the codicil to be annexed, *&c.* to the will. The deviſe to the charity is not void.

HENRY WINDOWE made his will *December* 13, 1734, deviſing the bulk of his real eſtate to three truſtees on certain truſts, and ſome particular lands to charitable uſes. In 1744 he makes a codicil; which, he publiſhes and declares, ſhould be annexed to, and be taken as part of the will: and thereby making ſome alteration in the diſpoſition of the truſt of the bulk of his eſtate, after reciting the deviſe to the charity, he deviſes the ſame lands, together with another piece of land, to the ſame three truſtees and two others and their heirs, upon the ſame ſpecial truſts and confidences as in the will: makes ſome alteration in the legacies in the will, and concludes with the confirming all other parts of the ſaid former will.

Upon a bill by the creditors and legatees, a queſtion aroſe between the defendants, whether this truſt for the charity can take effect?

For the heir at law it was inſiſted, that by the codicil the deviſe of theſe lands, both as to the legal eſtate and the
9 *G.* 2. truſt, is revoked: and ſo being a new deviſe to five truſtees for the charity, and made after the *mortmain* act took place, it was void, and the lands deſcend to the heir at law. The rule in the conſtruction of that ſtatute, and in the application

cation of the caſes thereto, is that if it would then have been good, the ſtatute makes it void for benefit of the heir at law: as was held by his *Lordſhip* in *Arnold* v. *Chapman*, 12 *July*, 1748, neither in reſpect of the legal or equitable eſtate could the court ſay, this codicil was not a new deviſe of the whole. The whole fee at law is certainly altered; paſſing to different perſons in different manners. The claim muſt be by them under the codicil; and in their five names muſt an ejectment be brought, and they muſt have joined in a conveyance. The adding more land, ſhews an intent to make a new regulation; although the argument in general is in favour of the intention: yet here the heir at law may take againſt it by the reſulting truſt. Revocations of the wills in general are very eaſily effected in point of law: any act ſhewing a change of mind, though ineffectual in itſelf, will do it: of which there are ſeveral caſes in *Montague* v. *Jefferies*, 1 *Rol. Ab.* 615, 616. *Mo.* 429. ſuch as a feoffment without livery. In Lord *Lincoln*'s caſe both below and in the *Houſe of Lords*, it was held a revocation, though the uſes intended thereby never took effect. So a conveyance in a man's lifetime, which for want of a proper inrollment cannot take effect as to the charity, yet would be a revocation of the will. A deviſe to *A.* and his heirs, and a codicil made after the ſtatute deviſes it to *B.* in truſt for a charity: that would be a revocation, and reſult for the heir. Ante. (179)

LORD CHANCELLOR.

Have you any authority for that? Suppoſe it was a deviſe to *A.* and his heirs: and a codicil give the ſame land to a monk and his heirs?

For the heir: That would be a revocation, as the feoffment would: for the truſts being void as to the objects, makes no difference in law or equity as to the revocation. *Howard v. Howard* was a very extraordinary caſe, which came out of the *North*: where one made a will in favour of a miſtreſs, whom he afterward married publicly; and in conſideration of the marriage ſettled the eſtate upon her in fee. Upon a bill to ſet it aſide, it was held by your *Lordſhip*, that the will was very providentially revoked by the ſettlement, although the uſes of the inſtrument could not take effect. It is not neceſſary to the revocation of a will or deed, that all or any of the uſes ſhould be changed; for another inſtrument limiting to the ſame uſes would revoke the former; being ſufficient to change the inſtrument;

ment; as by recovery, leaſe and releaſe, or feoffment to the uſe of the will. It may be ſaid, there are revocations in law, which are not held ſo in equity; as in a mortgage, which ſhall be conſidered in equity a revocation, only ſo far as the charge goes: but wherever equity does not conſider that a total revocation, which would be ſo in law, it is, where the matter is looked on in a quite different light, from what it is in law: as the mortgage is conſidered here as perſonal eſtate, and a perſonal charge on land: but it is otherwiſe, where conſidered the ſame way here as in law: as in a recovery by tenant in tail to effectuate a will, it is a revocation of the will. The caſes, where it has been held void by reaſon of the imperfection of the act done, (the ſtatute of frauds requiring particular circumſtances to revoke) as in *Onions* v. *Tryers*, do not come up to this; in which there is no defect in the ſolemnity of the execution, but an incapacity in the object. But the codicil is good, and cannot be eſteemed a concurrent act with the will, ſo as to paſs by both; the proper buſineſs of it being to revoke, as that is the effect of every alteration. By the *Roman law*, a codicil, not being ſo ſtrong as a will, could not deviſe away the inheritance: but in our law it is a new deviſe. Suppoſe the will void, as if one of the witneſſes was a legatee: it would take effect by the codicil.

(180) LORD CHANCELLOR.

Then the codicil referring to the will, and being well executed according to the ſtatute of frauds, would be a republication of the will.

For the heir: But ſtill it operates as a new deviſe: as in caſe of a re-purchaſe, it would be a revocation of the will, notwithſtanding it was put in the ſame plight. It is admitted to be void as to the new deviſed lands; and the truſts being to perform under the codicil, he could mean, it ſhould ſtand as to the will.

For the charity: The intent is the whole of the caſe, for the revocation cannot operate, if an intent not to revoke is ſhewn: and revocations are never favoured. It is common to put an end to the legal eſtate, and yet leave the equitable to take effect: as if the truſtee, to whom the legal eſtate is given, dies in life of the teſtator; it will not alter the truſt: but the court would carry it into execution; with this difference, that in one caſe the heir at law

law would be a truſtee, in the other thoſe named by the teſtator; and even on the foot of a charitable appointment, although no truſtee at all, the court would carry it into execution, upon the ſtatute of *Elizabeth*: ſo where the intent was to charge for the benefit of a third perſon, and the truſtee dies. The difference between the legal and truſt eſtate is only a fiction in law; the legal eſtate being only nominal. The codicil only meant to add to the truſtees: not revoke the truſts: and may ſtand with the will, agreeable to the general notion of codicils. The expreſs revocation in part ſhews an intent not to revoke, where not ſo expreſſed. A recovery by tenant in tail is a revocation, becauſe the eſtate is thereby otherwiſe diſpoſed of, and given to him in fee. So if the void inſtruments, plainly ſhewing an intent that the deviſee ſhould not take. *Arnold* v. *Chapman* is different; and would not have been ſo determined but from the peculiarity of the circumſtances; and was from neceſſity, becauſe it could go to no other than the heir.

Lord *Chancellor* ſaid, that there being ſome nicety in the queſtion, he would reſerve it for conſideration. Supra 186.

Wharam *verſus* Broughton, *December* 17, 1748. Caſe 97.

Abatement and revivor.

THERE was a decree againſt *Broughton* for payment of a ſum of money; for non-performance of which proceſs of contempt iſſued againſt him: all which he ſtood out; and a ſequeſtration, and ſeiſure of his goods and of a leaſehold eſtate; of which one *Hammond* had taken an aſſignment from *Broughton*, and *Steel*, *&c.* *Steel* comes in and makes claim of his intereſt; which is ſent to the *maſter* to be examined; to prove which an order was made, that *Hammond* ſhould be committed, unleſs he ſubmitted to be examined. The poſſeſſion of the leaſehold eſtate conſiſting of an inn was ordered to *Steel*, who ſhould give a recognizance with a condition for his anſwering for the value, and accounting for the profits made, in ſuch manner as the court upon hearing the report ſhould direct: and the order made on hearing that report was, that *Steel* ſhould pay to the ſequeſtrators, what ſhould be found due on that account. In the examination of *Steel* it was ſaid, that *Broughton* told him, he intended to withdraw himſelf: but now there was an affidavit of his being beyond ſea for about four years, nor was the decree againſt *Broughton* ever ſigned and inrolled.

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The

The plaintiff in the cauſe dying, the queſtion was, whether a revivor was neceſſary by his repreſentative, the widow and executrix, to keep up the ſequeſtration? if ſo, whether there were any circumſtances in this caſe to diſpenſe therewith.

LORD CHANCELLOR.

Conſidering the circumſtances of the caſe, and the great delay, and bad behaviour of the defendant in the ſuit, I do not wonder that the repreſentative of the plaintiff ſtruggles to have the moſt expeditious proceeding, and to prevent further delay by the forms of the court: and the ſame reaſon will induce me to aſſiſt her, if a foundation for it, as far as poſſible, conſiſtent with the rules of the court But unleſs on one particular circumſtance, (*Broughton*'s abſconding) concerning which more evidence has been this day laid before me, there is no foundation to let this proceeding go on without reviving the ſuit.

The matter conſiſts of two parts: the exception by *Steel*, coming in to be examined on his claim of intereſt; and the motion on the behalf of *Hammond* to diſcharge the order, although no party, and admitting he has no intereſt, and is only brought before the court to clear the queſtion of the claim of *Steel*. The order made on him was not in the ſtrict form; but to aſſiſt the juſtice of the caſe, as there appeared to be a connection and colluſion between them; *Broughton*'s aſſignment to *Hammond* being near the time of his abſconding.

It is inſiſted for the plaintiff, that *Steel* has not made the point of abatement one of the exceptions, although he has excepted to the merits: but if there is an abatement in fact, and a report made during that abatement, all this may be irregular, and the repreſentative of the plaintiff
(182) not have the benefit of it, notwithſtanding all that has been done.

The firſt queſtion is, whether there is a neceſſity by the general rules of the court, that the ſuit ſhould be revived on the death of the plaintiff? The ſecond queſtion, if ſo, yet whether there are ſufficient circumſtances in the caſe to induce and warrant a court of equity to go out of that rule, and to excuſe the repreſentative from reviving?

Upon

Upon the firſt two things are to be conſidered: whether the ſequeſtration, iſſued to compel performance of the decree, abated by death of the plaintiff, and whether the ſuit itſelf abated?

Sequeſtration to compel performance of a decree abated by death of plaintiff.

As to the firſt, it is very clear, (p) that it is abated; all the caſes being to that purpoſe; and none to the contrary. A diſtinction has been endeavoured between an abatement by the death of the plaintiff and of the defendant; and the caſes cited are ſaid to be of the death of the defendant: but there is is no ſuch diverſity: and an abatement by a circumſtance ariſing by the plaintiff is ſtronger, It is always ſo, where it is by act of the party: as in caſe of marriage by a *feme ſole* plaintiff; ſhe cannot bring her huſband as party to the ſuit immediately, but muſt bring a bill of revivor *. Whereas by the marriage of a *feme ſole* defendant it does not abate, but the plaintiff may proceed, only entering the name of huſband and wife in the ſuit. It is admitted, that if a decree be only executory, or *quod computet*, the death of the party abates: but it is inſiſted, that this is an abſolute decree, the ſuit at an end and executed, and the ſequeſtration ſhall not abate. But this is not the rule of the court; for a ſequeſtration being only laid on, and never executed, not affecting the thing, but only a perſonal contempt for non-performance of a decree, by death of either party, (though the caſes are generally of the defendant) it falls to the ground: as in *Bligh* v. Lord *Darnley*, 2 *Wms.* 619, and in the great caſe of *Colſton* v. *Gardner*, 2 *C. C.* 43; where it is imperfectly reported; for Lord *Nottingham*'s argument is very clear and well connected, as I have ſeen it in a manuſcript of his own, wherein he refers to *Bland* v *Witham*, before Lord *Shafteſbury*; ſaying, that after a ſequeſtration laid on againſt a father, and land deſcends to the iſſue in tail, the ſequeſtration is diſcharged, as in the caſe of Lord *Athol*. Whether it continued againſt the fee ſimple lands, was not then debated; but he conceived it did not, unleſs the ſuit revived

As alſo the ſuit abates, a further act being neceſſary; ſo that a bill of revivor muſt be: no *ſub. ſci. fa.* as the decree was not ſigned and inrolled.

(p) 3 Atk. 594. and 1 Vern. 58. contra where it is held, a ſequeſtration that iſſues as meſne proceſs falls with the death of the perſons, *ſecus* where it iſſues for non-performance of a decree; but in 2d Pr. Wms. 621. it is held to be a perſonal proceſs which abates by the death of the party, and therefore differs from an extent on a judgment which does not abate; alſo a ſequeſtration takes in the whole profits an extent only a moiety.

* The reaſon of this is, that a plaintiff ſeeking to obtain a right, the defendant may be injured by anſwering to one not intitled to ſue; but a defendant only juſtifying poſſeſſion, the plaintiff cannot be injured by a decree againſt one holding that poſſeſſion; but in the firſt caſe a neglect of a bill of revivor is not error to reverſe a decree. Chan. Pleas. 22.

revived againſt the heir and executor, although the ſon came in during the father's life, and ſet out a title by conveyance, becauſe after the father's death he has a new title as heir. So in *Burdet* v. *Rockey*, in 1682: where the bill ſet forth a ſuit againſt the late huſband of the defendant; and a decree in his life; and that for not obeying, contempt iſſued againſt him: and ſequeſtration againſt the (183) real and perſonal eſtate till ſatisfaction; and he dying, the ſaid commiſſion was renewed by order of the court, and an injunction ordered: the bill was in aid of the ſequeſtration. Demurrer thereto, for that by the plaintiff's own ſhewing the defendant being dead, the ſequeſtration abated, it not being for the lands in queſtion, or for any rent or incumbrance thereout, but for a perſonal duty in diſobeying the decree: and the rather for that after his death, no *ſubpœna* in nature of *ſci. fa.* yet iſſued againſt the defendant and heir, whereby they might come in and make defence. The demurrer was allowed; and the injunction for ſtaying the defendant's proceedings at law diſſolved: ſo that a revivor was held neceſſary. So in *Hide* and *Ramſhaw* v. *Greenhill*, *Auguſt* 1746, where it was taken for granted, that by the death of the defendant the ſequeſtration abated; and the plaintiff brought a bill of revivor againſt the defendant's executors and reſiduary legatees. The queſtion was only, how far the ſequeſtration was revived againſt the lands or perſonal eſtate? and I was of opinion, that being a decree for a perſonal duty, it was only againſt the perſonal eſtate: and that the ſequeſtrators ſhould account to the heir at law, for the profits of the lands received after the defendant's death; which is agreeable to the rule of law. This proceeding by diſpenſing with revivor is endeavoured to be ſhewn conformable to the rules of law concerning executions: but it is not ſo; as appears from *Clerk* v. *Withers*, 2 Lord *Raymond* 1072, where it is held, and certainly is ſo, that if upon a *fi. fa.* on a judgment againſt the defendant, after the goods are lodged with the ſheriff, which binds them, the plaintiff dies, the execution being begun, the *fieri facias* is not abated; the reaſon of which is, that in a *fieri facias* on a judgment the ſheriff is directed to levy the money to the uſe of the plaintiff; as the words of the writ, *ad reddendum*, *&c.* ſhew: and therefore by the ſeiſure of the goods and delivery to the ſheriff, the property is changed: and though the writ commands to have the money in court at the day, the ſheriff may pay the money to the plaintiff; in which he is warranted by law, though he cannot deliver the goods over to the plaintiff: but if a further act and proceſs of execu-

tion

tion is neceſſary to be done by the court, the law is otherwiſe. Therefore if after ſuch *fieri facias*, &c. the plaintiff died, and the ſheriff levies only part, not finding goods enough for the reſidue, and returns ſo much toward ſatisfaction of the debt, *quod parat' habet*, a ſecond *fieri facias* may iſſue to levy the reſidue, but the executors cannot have it without revivor of the judgment. Whereas in the other caſe the death of the plaintiff afterward makes no alteration; the right being veſted by the execution laid on the goods, according to the opinion of *Kelyng*, 1 *Lev.* 282. But *Holt* diſtinguiſhes all this from the caſe of an extent, *Cr. C.* 450. by which no right was veſted: a *liberate* being neceſſary; which comes near to the caſe of a ſequeſtration; which partakes not of the nature of a *fieri facias*, but of a writ of *extent* on a recognizance or *diſtringas*; veſting no right in the party, becauſe the execution is not complete, but a further act of the court neceſſary; which whether by proceſs or order makes no difference: and that further act is, that after ſeiſure by the commiſſioners of the goods and profits of the lands, and return to the court, the party muſt apply to the court, to have an account of the ſequeſtration taken, and an order made for ſale of the goods toward ſatisfaction of the duty decreed him; without which he cannot have it. For the writ of ſequeſtration does not require the ſequeſtrators to levy to the uſe of the plaintiff, but only to detain and keep in their hands till the ſum is fully paid, the contempts cleared, and the court make further order to the contrary. It is not of a great many years ſtanding, that the court has ordered goods to be ſold, to ſatisfy payment after a decree: but it is very lately, that the court has ordered it for a collateral contempt in proceeding before a decree; which the court now does in aid of its proceedings. By the plaintiff's death therefore before that further act, ſomething muſt be regularly done by the executor to revive the proceſs and ſuit; the party having a right to make a defence thereto; for he may ſet up ſome collateral bar: as in the caſe of a will, he may deny the ſeal of the ordinary; and the law-books ſuppoſe he may be able to ſhew a releaſe. To that it is ſaid, that this might be material, if the preſent proceeding was againſt the defendant, which it is not, but againſt *Steel*; to prove whoſe intereſt *Hammond* is ordered to be examined: but that does not prove the defendant to be out of the caſe. The ſequeſtration is the foundation, which if abated, that examination is gone alſo: like the proceedings in the *Eccleſiaſtical* court, from whence this court might have taken it; where if a ſtranger to a ſuit intervenes for an intereſt ſuppoſed, by abatement

Fieri facias not abated by death of plaintiff; the right being veſted. Otherwiſe of an *extent* where a *liberate* neceſſary. So of a ſequeſtration, becauſe a further act neceſſary,

abatement of that ſuit there is an end of the intervention which is tacked thereto. As this is ſo from the nature of the proceeding, ſo it is from the end and intent thereof; It being to ſhew whether theſe goods belong to the claimant or defendant; and if in the event the court ſhould think the claim not proved, they are condemned, and directed to be delivered over to the ſequeſtrators, as belonging to the defendant, who is therefore as much concerned as if the proceeding was againſt himſelf, and will not vary the caſe.

The ſecond conſideration is as to the abatement of the ſuit. In general, after judgment there is no abatement in that ſuit: but here a further act is neceſſary; and the falling of the ſequeſtration ſhews, there ought to be a revivor of the decree; and this court revives its decrees, as courts of law do judgments. The queſtion then is, in what manner the revivor ſhould be: whether by will, the common way, or by *ſubpœna ſcire facias*, which iſſues out of the record of the decree; and can only be where the decree ſigned and inrolled? So that there is no other way in (185) this caſe, but by bill in the regular courſe, which will revive the ſequeſtration and decree, when properly brought on.

But for the plaintiff ſuch difficulties are ſuggeſted, as amount almoſt to impoſſibilities to come at her right; which leads to the ſecond queſtion; that ſuppoſing the general rule laid down be right, that the ſequeſtration abated and a revivor neceſſary; yet here the repreſentative ſhould be excuſed from that difficulty, for two kinds of reaſons. Firſt, the order and ſecurity by *Steel* to anſwer the value; but nothing therein to take it out of the common rule; for if *Steel* proved not his claim, the order not being that it ſhould be paid to the plaintiff, the plaintiff muſt ſtill make further application to the court for payment; which brings it within the rule and diſtinction already laid down: and though poſſeſſion of the leaſehold in mean time was delivered to the claimant, that was only for the carrying on the trade; yet ſtill the ſequeſtration continued. But the ſecond and principal reaſon is from *Broughton*'s being beyond ſea for four years: ſo that no benefit could be by bill of revivor, becauſe of the *proviſo* in the ſtatute of *Geo.* 2. *cap.* 25. *ſect.* 8. which ſays, that no decree for want of appearance ſhall be, unleſs an affidavit that the defendant was within the kingdom within two years next before the proceeding againſt him: which indeed creates a great difficulty

culty; for as this decree is not ſigned and inrolled, there can be no *ſubpœna ſcire facias*, for if there could, I apprehend, it would help the plaintiff, and that the decree might be revived without appearance: although that is not clear on the practice: there being no precedent of it. The command of the writ is, that you perſonally appear in *Chancery*, and ſhew cauſe why, *&c.* on a certain day: it is true, on this an appearance is ſometimes entered; but ſuppoſe a *ſubpœna* ſo iſſuing to revive a decree, the defendant neither appears or comes to ſhew cauſe; I think (although no abſolute opinion) there may be an order to revive. As on a *ſubpœna* ſerved on an infant to ſhew cauſe within ſix months after coming of age, why a decree ſhould not be made abſolute: it ſhall be made abſolute without entering an appearance, if he comes not. If you do not ſhew in your own affidavit, that the defendant is beyond ſea, the court will not require an affidavit to be read, that he was within the kingdom within two years; but it will lie on him, when he returns, to ſhew that, and to impeach the proceedings, and then the court will put terms on him. But ſtill the proceeding is open to great difficulty; and it is ſaid, the court ſhould not be ſo bound by its forms, as not to come at juſtice. And certainly a court of equity does take ſometimes very liberal ſteps; as in the abatement of ſuits, and applications for collateral things to be done, the court will, notwithſtanding abatement by death of almoſt all the parties, make an order for delivery of deeds and writings; or ſend to the *Maſter* for inquiry, to whom they belong; or order money to be paid out of the bank without a revivor: as I believe I did in the caſe of Sir *Thomas Pendergaſt*. But that is, where the court muſt deliver itſelf from the cuſtody thereof ſome way or other, and proceed *ex officio*: but the queſtion here is upon a ſtrict execution under a decree, and very different. But upon this point I will not now give any certain opinion: but will expect ſome anſwer to this affidavit of to day, and afterward tell the remainder of my thoughts; becauſe if there is no anſwer thereto, ſo that the plaintiff may come at juſtice, I will as far as poſſible chalk out a method to come at it.

(186)

Wharam

Caſe 98. Wharam *verſus* Broughton, *December* 20.

AN affidavit was now read of the defendant's being within the kingdom within two years.

LORD CHANCELLOR.

I was in hopes, it would come out ſo. This will deliver the plaintiff from her difficulties; as ſhe may now bring a bill of revivor; and if he does not appear, it will be taken *pro confeſſo:* and then if any difficulties occur, this affidavit will be a ground to go on.

The exceptions ſtand over.

Ante 178. Willet *verſus* Sandford, *December* 20.

Lord Chancellor now delivered his opinion.

Revocation of a will.

(q) IF this truſt for the charity can take effect, it muſt be by the will; for if by the codicil, being made after the *mortmain* act, it is void: and the ſingle queſtion is, whether the codicil is a revocation or confirmation of the will?

Three kinds of intereſt in hands.

It is neceſſary to take notice of the different intereſts in land at this day. There are three kinds: Firſt, the eſtate in the land itſelf; the ancient common law fee. Secondly, the uſe; which was originally a creature of equity, but ſince the ſtatute of uſes, it draws the eſtate in land to it; ſo that they are joined and make one legal eſtate. Thirdly, the truſt; which the common law takes no notice of, but which carries the beneficial intereſt and profits in this court; and is ſtill a creature of equity, as the uſe was before the ſtatute.

To

(q) 2 Atk. 73. Ante 32. Poſt. 190. Prec. Chan. 459. 2 Vern. 741. S. C. 1 Eq. Ab. 407. S. C. 1 Wms. 343. Se. 1 Wils. 313. 2 Atk. 268. 4 Burr. 2512. Cowpr. 49, 87. Dougl. 30, 684. In theſe caſes it is held that the mere act of cancelling a will is no revocation, unleſs done Animo Revocandi. Vide 1 Wms. 345, Note 1, 4th Edw. where the law is collected from the ſeveral caſes on this ſubject.

To apply this. By the will, the eſtate in the land, and the uſe, are deviſed to the three truſtees and their heirs; for a deviſe of land, by force of the ſtatute enabling to deviſe, carries the eſtate in the lands, and the uſe too, without ſaying to the uſe of the deviſee: but the truſt and beneficial intereſt is to the charity. By the codicil, the eſtate in the land and the uſe is given to the ſame truſtees and two others: the truſt for the charity is exactly the ſame: but there is ſome variation of the ſurplus profits. It is undoubtedly a new deviſe of the legal eſtate; and therefore it was objected, that being ſubſequent to the *mortmain* act, it is void as well as the truſt: but that was ſoon given up at the bar; becauſe the variation of the truſts of the ſurplus profits, being good, is ſufficient to ſupport it: as it was held in all thoſe acts, which on a deviſe to unlawful truſts make the legal eſtate as well as the truſt void: but with this diſtinction, that if part of the truſt is good, it will ſupport the legal eſtate: as upon the *Popery act*, if part of a truſt is for a proteſtant as well as for papiſts; and then the only conſideration of equity is, how far the truſt is made void by the act?

By deviſe to unlawful truſts the legal eſtate as well as the truſt is void: unleſs part of the truſt is good; for that will ſupport the legal eſtate.

Next I am of opinion, that the beneficial intereſt and profits, that is the truſt, to the charity is not revoked, but confirmed by the codicil; which I ground firſt on the nature of the inſtrument; ſecondly from the words A codicil made after a will, and directed to be annexed thereto, is conſidered both in our law and in the civil law: (from which we borrow ours, with regard to wills) as part of the will: although in notion of law there may be other codicils not part of the will: as in the *civil* law, a teſtamentary ſchedule, though no will at all: but this is part thereof, and therefore in its own nature is not intended to be a revocation of the inſtrument of the will; (r) for there may be a revocation of the particular diſpoſitions, and yet not of the inſtrument, but to be added and made part thereof; as in ſeveral parts of *Swin.* but particularly 15, (*the new edition*) this differs therefore from the caſe of a ſecond will, which from the nature of the inſtrument has been held a revocation of the former, though no clauſe of revocation was inſerted; and is different from *Hitchins* v. *Baſſet*, 1 *Sho.* 537, *Caſes in Parliament* 146; in which caſe it was admitted throughout, that though a man could die with but one will, he might with ſeveral codicils, and no revocation:

Our law as to wills borrowed from the *civil* law.

Difference between a codicil and a ſecond will.

(r) A codicil revoking a legacy of 40,000*l.* it being in fact only 30,000*l.* and 10,000*l.* an appointment, revokes the appointment. 2 Brown, 51.

revocation: and a ſtrong authority is there cited, *Coward* v. *Marſhal*, *Cr. E.* 721, even on a ſecond will; the only doubt being that it aroſe on a ſecond will; for had it been a codicil, there would have been no queſtion; the inſtruments being part of one other, and to be taken together. Hence it follows, that as it ſtands clear of the doubt in *Shower*, it is ſo of revocations by act executed in life of the teſtator; as of feoffment without livery, bargain and ſale not inrolled; the effect of all which is in the teſtator's life to defeat the act; confirming nothing, but altering the eſtate in his life; which a codicil does not; taking effect (188) together with the will at the death of the teſtator. Then as the codicil is no revocation, farther than it is expreſſed; ſo from the words there is no expreſs revocation, but amounts to a confirmation of the truſt to the charity, which muſt have ariſen on the will, varying only the former part; *other parts* meaning parts not varied; which is the conſtruction always put on the words. So that being made in 1734, it is not revoked nor contrary to the act; and muſt be eſtabliſhed.

Caſe 99. Hughes *verſus* Truſtees of Modern College, *December* 12, 1748.

Injunction upon forcible entry granted againſt the commiſſioners of the turnpike for digging gravel in land leaſed to plaintiff for 21 years, and turned into a garden.

THE truſtees had agreed with the commiſſioners of the turnpike, to let them dig gravel in land, which they had leaſed to the plaintiff for twenty-one years; and which he had turned into a garden. The commiſſioners entered, took poſſeſſion, dug up the *legumens* planted, ſet a value on them, and made a ſatisfaction, which the plaintiff accepted.

The plaintiff moved for an injunction, to reſtrain further digging; which was refuſed; becauſe he had not made the commiſſioners parties: which having amended, he now moved it again.

LORD CHANCELLOR.

What the fruit of this injunction will be, or whether it will be too late to ſtop the miſchief done, I know not: but the queſtion is, whether there is not a caſe made by the plaintiff ſufficient for an injunction; and there clearly is. This court, as well as other courts of juſtice, will certainly give great allowance to the acts of the commiſſioners of the turnpike; and will not interpoſe to cenſure them, unleſs

leſs in a plain caſe; but not where there is any ground of doubt, whether they had authority or no; for then the court will not interpoſe, till that doubt is removed, and the matter finally determined at law. But no ſuch doubt is here; the plaintiff's right, and his remedy here, being plain to me, though not to the defendant's.

The turnpike act, and all theſe relating to highways, except meſſuages, houſes, gardens, orchards, yards, planted walks; without limiting it to any particular kind of garden; which are as much taken out of their juriſdiction, as if they had none: and if they act contrary, they are as much treſpaſſers as private perſons. The only thing creating a doubt, was the plaintiff's acceptance of that ſum in ſatisfaction: but that appears to be for a diſtinct matter; for the damage to his crop; not relating to the preſent queſtion of his poſſeſſion, and the commiſſioners became purchaſers of that groſs crop. They acted therefore without authority, and are in the caſe of private perſons entering by force into the ground, of which another had poſſeſſion for twenty-one-years; for which indeed there is a remedy at law: but that would be only for a particular wrong done, and not equal to the remedy in this court; in ſeeking which the plaintiff was right, and had a proper head of relief, being in poſſeſſion at the time of filing the bill, and three years before; the reaſon of which is, that the ſtatutes of *forcible entry* require it. To extend which ſtatutes, the bill is brought for an injuction, for which he has made a proper caſe; the bill now before me being the amended bill, which is above three years after making the leaſe. There is no imputation upon the truſtees; but however this ſhould not have been done; being ſomething like the caſe of *Naboth*'s vineyard: and its being in a country, where it is difficult to get gravel, is not a circumſtance, that will extend the authority of the commiſſioners; and the plaintiff has been in poſſeſſion all along: for repeated treſpaſſes from time to time did not gain them the poſſeſſion. (189)

Hawkins *verſus* Day, *December* 21, 1748. Caſe 101.

ON petition that the maſter ſhould review his report after exceptions thereto taken, argued, and the report confirmed by judgment of the court.

Lord Chancellor ſaid, he never knew an order to that purpoſe; and it would be of miſchievous conſequence: but errors in computation merely, might be ſet right at any time.

Caſe 102. Parſons *verſus* Lanoe, *January* 28, 1748.

Contingent will. Deviſe that if I die before my return from my journey to *Ireland*, my houſe and furniture to be ſold; legacies thereout; the reſidue and all real and perſonal to his wife and her heirs.

COlonel *Charles Lanoe*, intending to go to *Ireland*, made a paper writing in 1732, declaring it to be his laſt will in manner following; "If I die before my return from my journey to *Ireland*, that my houſe and land at *Farly Hill*, and all the appurtenances and furniture thereto belonging, be ſold as ſoon as poſſible after my death, and thereout all my debts and funeral charges be paid. *Item* 1000*l.* to *A.* out of the ſaid money ariſing by the ſaid ſale, and 100*l.* to *B.* and after all debts, legacies, and funeral expences diſcharged all the reſidue of the money ariſing from the aforeſaid ſale, and all real and perſonal eſtate, intereſt in houſes, and all other eſtate, to my wife and her heirs for ever," joining her in the executorſhip with others.

He returns to England and has two children having none before; the diſpoſition and the inſtrument both contingent and eventual; and it not having happened, cannot take place.

Query whether the having the children is a revocation.

He had then no children: and ſoon after purſued his intended journey to *Ireland*, where he continued ſome time: and after his return to *England* had two children by her, a ſon and a daughter, and lived till 1738. He kept this will by him: nor did it appear, that he made any other; (s) but there was evidence of his ſpeaking to his friends of a will; ſhewing he did not intend to die inteſtate, of which he expreſſed ſome deteſtation. The will or paper was proved in the *Eccleſiaſtical* court.

The legatee of 1000*l.* brought a bill for a ſatisfaction of his legacy: and in order thereto to have the real eſtate ſold: to which the widow and infant ſon and heir were made parties. Upon which the general queſtion was, whether under theſe circumſtances this inſtrument was to be conſidered as a will ſtill ſubſiſting? Under that, two conſiderations aroſe: firſt whether this will, either the inſtrument or diſpoſition made thereby, is merely a conditional contingent, inſtrument of diſpoſition, depending on the event of his death before his return from *Ireland*, or whether

(s) Ante, 32, 186.

ther abſolute and ſubſiſting in all events? ſecondly, ſuppoſing it abſolute and againſt the heir at law; whether that great alteration in his circumſtances, by having two children after the making it, will amount to a revocation or an annihilation thereof, ſo as not to be ſubſiſting at his death?

LORD CHANCELLOR.

As to the firſt conſideration, I think it was merely a proviſional contingent diſpoſition, and conſequently in my opinion (though that is not now for my conſideration) no part thereof was intended to take effect, but in the event of his dying before his return; in which view it was made.

The inſtrument of a will or codicil may be eventual as well as the diſpoſition, and ſhould not then be proved in court eccleſiaſtical.

It has been argued, that although the diſpoſition might be made conditional and contingent: yet it was impoſſible to make the inſtrument ſo. If the entire diſpoſition is made ſo, the conſequence will be the ſame: but though it be truly ſaid, that in the ſeveral chapters of *Swin.* of conditions, there is no inſtance of the inſtrument of the will being made eventual: I am very clear, without help of an authority, that a will or codicil may be entirely depending on a contingency, ſo as to have no effect, as an inſtrument of a will, unleſs that event happened. Nor ſhould it be proved in the *Eccleſiaſtical* court. The caſe in *Swin.* depending on the return from *Venice* within a certain time, though not clearly the preſent caſe, is like it. The deviſe of the ſale of the eſtate at *Farly* is admitted to be contingent: the queſtion then is, whether this clauſe does not make the whole contingent? If only the diſpoſition, not the inſtrument, be made contingent, it ought to be proved in the *Eccleſiaſtical* court as a will, and left to the proper courts to judge what effect that diſpoſition will have. It is rightly argued, that if the foundation on the part of the plaintiff be true, of the contingency's being only applicable to the direction for ſale of the eſtate, nothing but that will fail, and the reſiduary deviſe will be good. But that conſtruction cannot be made; the whole depending on the contingency firſt mentioned, and muſt be taken together; for if the eſtate at *Farly* cannot be ſold, how can the plaintiff's legacy ariſe out of it? And it is admitted, that the 100*l.* legacy is alſo to come out of the money ariſing by ſale: and this is warranted by the words of the ſubſequent reſiduarg clauſe: ſo that all was to be paid out of the money ariſing by ſale; which ſale was not to be made, unleſs he died before his return from *Ireland*; ſo that the whole diſ-

position was provisional, only to take effect in that event. And as to the instrument itself, if necessary to enter therein, there are words to warrant this; it being declared to be his will *in manner following*, so that it is not an absolute will. The penning of the will then being so, collateral or parol proof cannot be taken into consideration; which would be dangerous, and what the court since the statute of *frauds* is not warranted to do; for nothing will set it up but some act done by him after that event to republish the will, or defeat the condition.

Revocation of a will.

This makes it unnecessary to give any opinion upon the second question: but as it greatly strengthens the construction upon the first, I will say a little to it. It must be taken, that the children would be absolutely disinherited thereby; because left in the power of their mother; although there is no doubt of her good intentions toward them. It has been endeavoured to rebut this, from circumstances of the family, *viz.* a settlement in 1755, of a real estate which came to her, and is alledged as a reason, why the testator might intend his will should stand: but the appointment of the proportions to the children appears to have been entirely in her pleasure; who might give the greater part to the daughter. It has not therefore the force of such a settlement, as vested an absolute estate in the son out of the power of the mother. This question relates to the real and personal estate. As to the personal it is held in *Lug* v. *Lug*, 2 *Sal.* 592, 1 *Ld. Raym.* 441 (reported from Serjeant *Cheshire*, which is no bad authority) that marrying and having children afterward, is a revocation: and although it is said to be generally taken otherwise now; and that subsequent authorities are against it; and though I have heard it mentioned *obiter* by judges, that such a change of circumstances would be a revocation; I have not known any case or judicial authority to that purpose: but I will not give any opinion thereupon; for if so settled by the *Delegates*, I will say nothing to disturb it. But there is a great difference even on the *statute of frauds*, between the penning of the two clauses relating to revocations of devises of land, and of personal estate. The first is an express exclusion of all other manner of revocations whatsoever; the other clause is only a limitation and restriction upon the method of revoking a will of personal estate by words or writing; leaving all other methods existing. But the words of the first are both negative and affirmative, excluding any other manner of revocation, as by accident, &c. There may be good reason in the differ-

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A difference in the statute of frauds between the penning of revocations of wills of real and personal state.

ence

rence taken between the marrying, and having children after the making the will (which is a total alteration of circumſtances) and the having children only when married before: in which caſe the teſtator is preſumed to ſuppoſe that by poſſibility, his wife may have children; which event is before his eyes at the time of making the will. Of this I give no opinion; but only mention it to ſhew the difference on the penning of the ſtatute between revocations of wills of perſonal and real eſtate: (t) but principally that however it be as to ſuch an alteration of circumſtances being a revocation, yet wherever there is ſuch an alteration as this, no liberal or ſtrained conſtruction ought to be made of ſuch a will, to make it effectual: but a court of equity and of law would give ſuch a force to ſuch conſtruction, as would make the will contingent, to prevent ſuch inconvenience as this I mean in general) from taking place. The will therefore was a contingent, eventual diſpoſition; which not having happened, neither the diſpoſition of the real or perſonal eſtate can take place: and therefore this bill for the payment of the legacy thereout muſt be diſmiſſed without coſts: unleſs the plaintiff thinks he can eſtabliſh this will at law; for it is not a queſtion, upon which I can make a caſe; depending on circumſtances of evidence, which muſt be laid before a jury.

Where an alteration of circumſtances by having children after making a will; no ſtrained conſtruction ſhould be to make the will effectual.

But there is a better way to take; and perhaps better than to have come here, *viz.* To get a private act of parliament; for it is ſaid, there are debts, which will go a great way to exhauſt the eſtate.

All the difficulty upon the infant would be, that the *parol* would demur, which is often the ground of a private act; for otherwiſe an infant's eſtate might be eat up and ruined by what was intended for his benefit.

Parol demurring.

Legard *verſus* Daly, *January* 28, 1748-9. Caſe 103.

ON a bill to ſettle the queſtion of heirſhip to the Duke of *Buckingham*, the defendants *Waſh* and *Daly*, in their anſwer, claimed to be coheirs with the plaintiffs.

New trial

The court directed two iſſues: Firſt, whether the plaintiffs and the defendants Lord *Mountjoy* and Mr. *Shaftoe*, were the

(t) Deviſe of a college leaſe, afterwards the leaſe is renewed, the new leaſe does not paſs by the will. 1 Brown, 261, 401.

the only coheirs at law of the *Duke?* The ſecond, whether the defendants *Walſh* and *Daly* were coheirs? And if the jury ſhould find any others to be coheirs, except ſuch as directed in the iſſues, it ſhould be indorſed accordingly.

Before the Trial, the defendants *Walſh* and *Daly* diſcovered a pedigree in the *Duke*'s own hand, not known or to be come at before, giving them a better title in excluſion of all others upon which, ſeven days before the trial they moved to put it off, that they might be better prepared, and to have the iſſues rectified: but the plaintiffs oppoſed this, and the court refuſed it, upon its being ſo late, and other circumſtances: but declared, this would be very proper evidence to encounter the plaintiffs on that iſſue: ſo that they proceeded to trial; and on this pedigree there was a verdict, that the plaintiffs and Lord *Mountjoy* and Mr. *Shaftoe* are not heirs at all: then that *Walſh* and *Daly* are not coheirs with any others, but ſole heirs.

Upon its being ſet down to be heard on the equity reſerved, five years after the trial, the plaintiffs moved by leave of the court to have a new, or another trial; objecting, that the verdict is contrary to the anſwer, and to the intention of the court in the decree, and not warranted by the true ſenſe and meaning of the iſſues; it was obtained on new evidence by ſurprize, againſt which the plaintiffs had not opportunity or time to make a defence, and conſequently not ſufficient for the court to make any directions in the cauſe. There appears to have been an attainder of one of the anceſtors, from whom the defendants claim; but ſuppoſing this ſuch a trial and verdict as were ſufficient to ſatify the conſcience of the court; yet one of the plaintiffs being an infant; that is a diſtinct ground, on which there ſhould be a new trial: as in *Stapleton* v. *Stapleton* Though new trials are diſcretionary, all the circumſtances, upon which they are uſually granted, concur: an infant's inheritance being to be bound; a queſtion of land; of value, and doubtful; and there having been ſurpriſe; each of which ſingly has been held a ſufficient reaſon. And ſuppoſing if the plaintiffs had come recently, they would be intitled; there is no lacheſs; if not having been ſet down to be heard till lately.

LORD CHANCELLOR.

I would firſt obſerve, that whether the court directs a new, or another trial, it muſt be of theſe very iſſues here directed,

directed, for no application on the part of the plaintiffs to vary them, or to rehear the cauſe; ſo that they contradict themſelves, aſking a ſecond trial of theſe iſſues, which yet, they tell me, cannot determine the cauſe. As (194) to its being contrary to the anſwer, where people are forced to claim by collateral deſcents under ancient pedigrees, which ſince the abolition of the court of *Wards* are not ſo well kept as formerly, (although greater advantage than inconvenience has reſulted from that abolition) if by their anſwer they ſet out their pedigree ſo, as not to be ſtrictly the ſame as it appears to be on the evidence; but it comes out better for them in fact, it would be holding very nice, ſhould the court ſuffer their anſwer to prejudice them. Nor can I think it contrary to the decree; the intent of which was to take in the whole; ſo that if the jury ſhould find any other perſons in any other mannner than therein deſcribed, it is found directly within the words of the ſecond iſſue, and the meaning of the direction for the indorſement; which was that the whole right ſhould be tried: nor was there any ſuch ſurpriſe as to be a ground for a new trial; which, if granted, would make a moſt extraordinary precedent. The plaintiffs themſelves, who now complain of ſurpriſe, oppoſed the motion for putting off the trial; and though infancy is ſometimes allowed for a cauſe, as in *Stapleton* v. *Stapleton*; that is, where it is neceſſary to bind the rights of the parties: infancy being then an ingredient: but not in this caſe which would give infants a moſt extraordinary privilege of bringing a new bill upon coming of age, after having had as many decrees as they pleaſed during minority. If what is ſaid of the attainder be true, it puts an end to all their titles; finding a title for the King, who would not be prejudiced by the verdict: but that helps not the plaintiffs, nor gives them a right; ſo that there is no ground for a new trial, if no more in the caſe.

But there is another reaſon, which weighs greatly with me, *viz.* the length of time, being five years and a half ſince the trial; which would be an object even in courts of law; as in the caſe of the corporation of *Marlborough*, when I was *Chief Juſtice:* where upon a *mandamus* a new trial was refuſed after three years only, becauſe they ſhould have come recently; and although it was not ſet down till lately upon the equity reſerved, it cannot be ſaid, the other ſide ſhould not have applied for a new trial; for perhaps the defendant might have no reaſon to ſet it down.

The

The bill therefore must be dismissed with costs at law: but no costs in this court, because this pedigree and title was found after the decree.

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Case 104. Jeanes *versus* Wilkins, *February* 4, 1748-9.

Debtor in custody on *Ca. sa.* sheriff seises under a *fi. fa.* and sells after the return of the writ expired, and no *venditioni exponas*; *vendee* assigns to the sons of debtor, who join in assignment to *Cole*.

A Creditor having the body of his debtor in execution under a *capias ad satisfaciendum*, during the continuance thereof, the Sheriff takes out execution under a *fieri facias*: seises a leasehold estate of 99 years: but made no sale thereof, till after the return of the writ of execution is expired; then sells it: but no continuance of the writ of execution, nor any writ of *venditioni exponas*. The vendee assigns it in trust for the sons of the debtor, who join with the trustee in an assignment to one *Cole*; but there was evidence on the part of the plaintiff, that the debtor's family are still in possession. In contradiction to which, evidence was read, that *Cole* or his under tenants are still in possession and receive the rents.

The sale by sheriff is good; but an inquiry into the fairness of the transaction.

Three questions were made; two of law; the third of equity. First, whether this execution by *fi. fa.* issued out, was such as would authorise the Sheriff to sell the term and assign it? Secondly, whether the sale by the Sheriff was regular by virtue of this writ of execution, so as to convey a good estate in point of law to the defendant *Cole*, supposing the whole transaction fair? The third, whether it was fair?

Lord Chancellor.

To avoid the sale and title of the defendant it must be proved, that the *fi. fa.* was void, and conveyed no authority to the sheriff; for it might be irregular, and yet if sufficient to indemnify the Sheriff, so that he might justify in an action of *trespass*, he might convey a good title, notwithstanding the writ might be afterward set aside. It is said, that by law, during the existence of the *capias*, and the person in custody, a *fi. fa.* ought not to be taken out; and certainly it ought not; although if the defendant dies, the plaintiff may have a new execution, as upon the statute 21 *J.* 1. yet while that continues, resort cannot be to any other execution; and the court, without putting the party to his *audita querela*, would (as I apprehend)

hend) ſet it aſide on motion. But yet that *fi. fa.* was not void: and the Sheriff might juſtify taking this leaſehold by that writ: and ſo may the purchaſer under the Sheriff, who gains a title: otherwiſe it would be very hard, if it ſhould be at the peril of purchaſer under a *fi. fa.* whether the proceedings were regular or not; and the law is the ſame, although the *fi. fa.* iſſued in a different county from that, wherein the body was taken into cuſtody.

Purchaſer under a *fi. fa* may juſtify whether the proceedings regular or not.

As to the ſecond queſtion: I am of opinion, that it did convey the eſtate of this term to the purchaſer, although the ſale was made after the expiration of the return of the writ: and no neceſſity for a writ of *venditioni exponas*; which, though a proper writ, is not of neceſſity, being rather to compel the Sheriff, when guilty of lacheſs, to do what he has authority to do, than to give him a new authority. *Cr. J.* 73. proves it not of neceſſity, in caſe the Sheriff is willing to do his duty; where though it is not ſaid, that the return was expired, yet the manner of ſtating the objection imports it; for before that there is no occaſion for a *venditioni exponas*. This authority muſt be conſidered and taken together with 1 *Lev.* 282. *Wilbraham* v. *Snow*; where though the ſaying of *Keeling*, *C. J.* is wrong, according to the *quære* put there, the judgment of the court is, that the Sheriff has a ſpecial property, ſufficient to maintain the action; the property being aliened out of the owner. The goods, by being lodged with the Sheriff, were bound from the delivery of the writ by the *ſtatute of frauds*, in the caſe of a common perſon; although in the caſe of the crown it remains as at common law: the Sheriff muſt gain a property till execution of the whole; which cannot be till ſale of the goods, and payment of the money to the plaintiff, till when this ſpecial property continues; and the ſale, though after the expiration of the return, was good. And the common courſe of proceeding ſhews this; the Sheriff not being bound to make a return of the writ of execution, unleſs the party requires it.

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Venditioni exponas a writ not of neceſſity.

Sheriff under *fi. fa.* has a ſpecial property, and the goods bound from delivery of the writ in caſe of a common perſon.

But as to the point of equity I have more doubts: it is under very extraordinary circumſtances. Who are *Cole*'s under tenants? The expreſſion is ſo general, I do not know what to make of it; for if *ceſtuy qui truſt* continues in poſſeſſion, the law ſays, he is tenant at will to his own truſtee. This being a tranſaction between perſons *conjunct*, as the *Scotch* law calls it, looks a little unfair; and I will direct an inquiry by the *Maſter* into the fairneſs of it.

Wyth

Caſe 105. Wyth *verſus* Blackman, *February* 7, 1748-9.

COLONEL *John Thurſton* in 1695, made a voluntary ſettlement, and limiting the real eſtate to himſelf for life, without impeachment of waſte; remainder to truſtees for 500 years, to raiſe money for payment of his debts, remainder to his nephew *John* for life; remainder to truſtees to preſerve contingent remainders; remainder to the firſt and every other ſon of *John* in tail male, remainder over in default of ſuch heirs male to four perſons, (three of whom were his ſiſters and the fourth a daughter of a deceaſed brother) and their heirs, in truſt that they or the ſurvivor, or heir of ſuch ſurvivor, ſhall or may ſell the
(197) premiſſes, as ſoon as convenient: and that the money raiſed thereby, together with the meſne profits, may be equally divided between them (naming them particularly) or the reſpective iſſues of their bodies, in caſe they, or any of them, ſhall happen to be dead at the time of ſuch failure of iſſue-male of *John*, ſhare and ſhare alike, *viz.* to each of them, or their reſpective children, one fourth part thereof: provided that if any of them ſhall happen to be dead without iſſue, when there ſhould be ſuch a failure of iſſue of *John*, then to be equally divided among the ſurvivors or their reſpective children, in caſe any of them alſo ſhall be dead, leaving iſſue of their bodies.

In 1697 he made a will, firſt reciting ſhortly the ſettlement; then that all his houſehold ſtuff at *H.* at his death ſhould remain and continue there for the uſe of ſuch perſon or perſons, as ſhould enjoy the eſtate by the aforeſaid ſettlement, to be delivered to him or them by his executor, when the perſon, who was to enjoy them, was capable of giving a diſcharge: in the mean time his executor to take care of them, but not to be chargeable for loſs, but that the ſame ſhould remain there, as in his own poſſeſſion if he was living.

After his death his nephew *John*, the next tenant for life (then but eight years old) enjoyed the eſtate, which came into poſſeſſion upon the debts being paid off, till 1744, when he died without iſſue: at whoſe death none of the four perſons were living; the niece having died without iſſue: but of the three ſiſters, by Lady *Chaey* there were

were children then living; by Mrs. *Wyth*, children and great grand children: by Mrs. *Blackman*, there were only grand children, and no children then living.

The bill was brought by the ſurviving children of Lady *Chancey* and Mrs. *Wyth* to have the whole divided into moieties: in excluſion of the grand children of Mrs. *Blackman* and of the great grand children of Mrs. *Wyth*.

For plaintiffs: *Iſſue* in a deed is a proper word of purchaſe, deſcriptive of particular perſons; which is the primary ſenſe of it; although in wills, *ut res magis valeat*, it has been conſtrued a word of limitation. Although the court has gone ſo far as to conſtrue an elder to be a younger child by its liberal expoſition of the truſt of a term created for a proviſion for children in marriage-ſettlements; yet not in other caſes. It was held ſo by his *Lordſhip* in *December* 1742; but the conſtruction contended for goes farther than is allowed even in wills, 2 *Ver.* 107, where it was refuſed to conſtrue it to children's children. This ſettlement is particularly deſcriptive of the perſons: and the bounds preſcribed beyond which it ought not to go. There is no ſuch neceſſity here as in *Wild*'s caſe; and there is the leſs neceſſity for conſtruing this to ſo remote a degree, as the donor had none other but thoſe four perſons in view; who might probably be all living at the time of the ſale; if *John*, who was then very young, died ſoon without *iſſue*. The *viz.* alters and limits the ſenſe of the word *iſſue*; and denotes both the ſhares and perſons to take: and where the truſt or beneficial intereſt is more extenſive than the legal intereſt, the court will make the legal as extenſive. (198)

Againſt this was cited *Wild*'s caſe; and that the word *children* often means remote children, appears from that very caſe in 2 *Ver.* 106. The *viz.* was not to explain what *iſſue*, or the perſons who were to take, but only the particular ſhares; the *proviſo* meant a general failure of iſſue; taking in all the deſcendants: and by the other conſtruction an accident might happen, which could not be deſigned, of reſulting to the heir at law.

A ſecond queſtion was made as to the furniture and houſehould ſtuff; that there was not ſuch an abſolute intereſt veſted in *John* as to be tranſmiſſible to his repreſentative: and although if the contingency of *John*'s having a ſon had happened, the limitation would not have taken effect,

2 Ver. 600. Sal. 156. 2 Wms. 694, 886.

effect, becauſe too remote: yet the limitation over good: according to *Higgins* v. *Dowler*, and *Stanley* v. *Lee*, and they ſhall go as heir-looms with the ſeveral limitations of the real eſtate.

For the repreſentative of John: This houſhold-ſtuff was delivered by the executor to *John* according to the directions; moſt of which he had ſold and removed. The doctrine contended for was exploded in *Clare* v. *Clare*; Lord *Talbot* ſaying that ſubſequent accident could not make good the limitation; and the caſes cited are there conſidered, as not ſupporting that doctrine. In *Leviſon Gower* v. *Groſvenor*, the party had himſelf pointed out the double contingency, of having no ſon, or if having, he ſhould die before twenty-one. The clauſe there was, that the plate, jewels, *&c.* ſhould go as heir-looms, as far as by law they might, to the heirs-male of the family ſucceſſively, as the real eſtate went by the ſettlement. But your *Lordſhip* declared you did not give your opinion upon that principle; but on this, that there was no clauſe here that they ſhould go as heir-looms; or, if ſo intended, it was while the eſtate remained in the family; not for thoſe for whom it was ſold.

Caſ. Talb. 21.

LORD CHANCELLOR.

The truſt of a real eſtate may be claimed by thoſe who have right as real, and a conveyance accordingly,

I fear, both the bill and the defence are founded on a wrong principle: that this is mere money, and perſonal eſtate: but I do not take it ſo; but that it is real eſtate: and ſo in equity, becauſe the rents and profits till ſale are to go in the ſame manner, which is the truſt of a real eſtate, according to which all the perſons might have come into this court, and prayed a conveyance of this eſtate; which could not have been oppoſed: and is the ground of the determination in the *Houſe of Lords* in *Roper* v. *Ratcliff*, *viz.* that the ſurplus of the eſtate ſold being real, whoever had a right to the truſt might have brought a bill claiming it as a real eſtate without oppoſition: which was an inſtance more liable to objection than this; the eſtate being there deviſed for payment of debts; and the queſtion was only as to the ſurplus, whether it ſhould in equity be conſidered as real or perſonal. It was held to be real, as part of the ancient truſt, on this principle, that the owners might have come into the court, taking upon themſelves the payment of the debts, and deſiring the ſurplus of the eſtate to be conveyed to them. Then much more, when the perſons intereſted are made truſtees, and the eſtate given

ven to themſelves, might they come and pray a conveyance of the land itſelf in the ſame proportions: nor is there any objection againſt the ſiſters having the inheritance; for the direction to ſell, and give them the whole money, will give it them: and although certainly, where money is agreed to be turned into land for valuable conſideration, or the contrary, in equity it will be conſidered as done: or where any words in a will importing land to be taken as part of the perſonal eſtate. But on a bare direction in a will giving real eſtate in truſt to be ſold, and the money to be ſo divided, I do not know the court has ever taken it to be ſo. I do not give any opinion now, but mention it for your conſideration. Where land taken as money.

But all parties agreeing to have it conſidered as money;

Lord Chancellor delivered his opinion.

This is a very particular caſe, and an extraordinary limitation and diſpoſition of a real eſtate: but the court muſt make ſuch a conſtruction as appears agreeable to the intent of the donor and creator of this truſt. Whatever doubt there may be on this caſe; whether to be taken as real or perſonal, (of which I have great doubt) yet as all parties ſubmit to have it conſidered as perſonal eſtate, not of the original donor, but of the reſpective perſons who were to take under him, and as it is for the intereſt of the defendants the infants to have it ſo taken; and as it will rather tend to ſupport my opinion, even though any other ſhould take it as real; I will conſider it as money.

The firſt queſtion is, whether theſe children of two of the ſiſters are intitled to have the whole of this eſtate divided into two ſhares among them? Or whether the grand children of the other, and the great grand children are intitled to a ſhare with them? Which will turn principally on the conſtruction of the words *iſſue* and *children* in this declaration of truſt. Whether *iſſue* is to be reſtrained and abridged by *children*; or *children* enlarged and extended by *iſſue*. (200)

To pave the way for the conſtruction of this truſt, his intention ſo far as it can be collected, muſt be conſidered. And firſt, it ariſes clearly, that though he might have in view and expectation, that this truſt might be executed at no Intent of declaration of truſt to provide for the ſeveral ſtocks and at diſtance of time: children extended to *iſſue* in general.

no great diſtance of time; he had in view alſo, that it might riſe and take effect at a very great diſtance; by the limitations to the ſons of *John* continuing ſeveral years, ſo that there might be no poſſibility of theſe ſiſters being then living; as appears throughout the whole, and ſhould not therefore be confined to a ſpeedy failure of iſſue-male. His next general intent was clearly, after failure of the iſſue-male and theſe remainders taking place, to make a proviſion not only for the ſiſters, if living, but for the ſeveral ſtocks and branches out of this truſt: if the conſtruction for the defendants prevail, it anſwers that intent; whereas that for the plaintiffs narrows it to the children of the ſiſters: and if the failure ſhould happen at the end of 100 years, when the ſiſters and all their children are dead, all their deſcendants would be thereby cut out, and the truſt would reſult to the heir at law; which would certainly be contrary to the intention to provide for their ſtocks: then conſider, how the words are capable of a conſtruction to anſwer this intention. If it reſted on the word *iſſue*, there is no doubt; being a deſcription taking in all iſſues *in infinitum*; although not in notion of law as eſtates tail, but as purchaſes by deſcription; being iſſue of the body: and there is no difficulty in the thing, the diviſion being very eaſy and natural among them. The great objection to this is from *videlicet*, that being an explanatory clauſe, it reſtrains *iſſue to children*: but that was not the donor's meaning; which was, as is ſaid for the defendants, principally to explain the ſhares thereby; although he might mean both. A difficulty might have occurred to the drawer, that one might die, leaving three or four children or grand children, who might be conſtrued to come in *per capita*, to have equal ſhares of the whole with the ſurviving ſiſters: to avoid which doubt he explains, that the iſſue or children of the deceaſed ſhould take only the ſhare of the deceaſed. In *Wild*'s caſe, 6 *Co*, and in *Bend.* 30, it is ſettled, that *children* bear a coextenſive ſenſe with *iſſue*. Then why ſhould not the court take this to be ſo, if it more fully anſwers the intention of the donor who created this truſt, which might take effect at a diſtance of time? But the *proviſo* is deciſive; under which the plaintiffs claim, and muſt bring themſelves within the contingency put there; which not having happened, as Mrs. *Blackman* leaving grand children living, did not die without iſſue, it cannot be divided into two ſhares only; for the death of the
(201) niece without iſſue will only warrant a diviſion into thirds: and the donor underſtood, when a perſon is dead without iſſue; for by the failure of iſſue-male of *John* he meant failure

failure of deſcendants of his body generally, not of ſons and children only, and has uſed the words in the ſame ſenſe. Here *iſſue* and *children* are again uſed in a general collective ſenſe *in infinitum*. (u) According to the authorities, grand children, and great grand children, are all children, and come within that to certain purpoſes: and in 2 *Ver.* 106, it is ſaid in the concluſion, that it is allowed by all, if no children are in being, grand children would come in under the word *children*, and may be thereby deſcribed; which is ſufficient for the preſent purpoſe. This makes the conſtruction conſiſtent with the donor's intent to provide for the execution of the truſt at a diſtance of time, and for the ſeveral ſtocks, who would be unprovided for, if reſtrained. An inconvenience is urged from its being to be divided among a great number, ſplitting the property, which may not be for their advantage, nor according to the donor's meaning. He has made a proviſion for ſuch right of repreſentation, as the *ſtatute of diſtribution* allows among collaterals, brothers and ſiſters children, conſidering the ſiſters and niece as collateral among themſelves, (as they were) and it has been held brothers and ſiſters of the inteſtate: but that objection holds not on the foot of the intent; which lets in the niece and her children; going one degree beyond the right of repreſentation allowed by the *ſtatute*, by which grand children of brothers or ſiſters are excluded. But the queſtion here is not of the perſonal eſtate of the donor, but of thoſe who were to take under it; and then not to be conſidered on the foot of a collateral, but lineal ſucceſſion, which may go *ad infinitum*; for according to the firſt clauſe of the ſtatute, all the ſtocks are to take, and the repreſentation to go on *pro ſuo cuique jure* to the great grand children repreſenting their reſpective parents; and ſo not more inconvenient than in caſes ariſing on that ſtatute.

Extent of the word children.

Statute of diſtribution.

It is objected that nothing veſted in the parent by Mrs. *Blackman*'s dying in the life of *John*, ſo that her grand children cannot take from her, in whom nothing veſted. But to give a right of repreſentation there is no occaſion for veſting in the anceſtor. Under the ſtatute, nothing veſts in the anceſtor; for then it is gone. So that the children or grand children of thoſe dying, take (not by perſonal deſcent; which the law allows not) that ſhare their anceſtor, if living, would have taken, becauſe nothing veſted in the anceſtor.

To give right of repreſentation no occaſion for veſting in the anceſtor.

The

(u) Ante, 3.

(202) The word *children* therefore muſt be explained and extended to iſſue; and if the grand children prevail, then the great grand children muſt be let in. But the queſtion is, whether they ſhould take *per Capita* or *per Stirpes*? But the authority of the ſettlement has ſhewn in what manner; *per ſtirpes* as to the ſtock, *viz.* that which would have belonged to each ſiſter, if living, to go to their reſpective iſſues; but to be divided *per Capita* among themſelves, as according to the ſtatute of diſtribution in lineal ſucceſſion. Nor is there any objection or inconvenience from their taking *per Capita* and *per Stirpes* at the ſame time.

Taking *per Capita* and *per Stirpes* at ſame time.

Deviſe that houſhold ſtuff at *H.* ſhould remain there for uſe of thoſe who ſhould enjoy the eſtate by a ſettlement, to be taken care of and delivered by executor, *&c.*

The remaining queſtion, as to the furniture, does not at all depend on the ſettlement, but on the will. The limitation of the houſhold-ſtuff, in the manner the plaintiffs contend, would be very extraordinary. (x) The intent was, they ſhould be enjoyed by the perſons living in the family, but not to be ſold as heir-looms with the houſe for the purchaſers of the eſtate, when turned into money. There is no direction, importing they ſhould go as heirs-looms; nor ought the court to make any ſtrained conſtruction for that purpoſe. The age of twenty-one is the time, the diſcharge was to be given; the ſaying *him or them* is only inaccuracy, from not knowing who would be the firſt taker. *Them* being commonly ſo uſed when ſpeaking of an uncertain perſon and not in the plural number. But what determines me in my opinion, is, his referring all to the care of his executor; who ſurely was not to take care of them in ſucceſſion. I do not know, that ſuch a limitation over of a perſonal chattel has been held good, merely becauſe the contingency never happened. *Higgins* v. *Dowler* has been oddly and differently reported; nor do I know what to make of it; and where there is a double contingency, it may be a good limitation in one inſtance, and not in another. *Gower* v. *Groſvenor* went on another foundation; the direction being there to go as heir-looms, as far as by rule of law they might: and becauſe the truſt might be ſettled according to the rules of law to one, and if he died before twenty-one remainder to another, that might be good, becauſe ſuch a limitation might be. But I did not determine that point; nor do I now.

They go to the repreſentative of the firſt taker, who was tenant for life, and were not to be ſold as heir looms with the houſe, although no tenant in tail veſted.

The

(x) Brown 274. 2 Vol. 121, 277. But in Prec. Chan. it was held that in ſuch caſe the goods ſhall go according to the deviſe, and not be in the power of the firſt taker; unleſs he had an abſolute property in the houſe, as his intereſt ſhould be the ſame in both, if tenant for life he ſhould have only the uſe of them for life; if tenant in tail, as he then has the abſolute property of the eſtate, he ſhall have the ſame in the goods.

The bill must be dismissed; but the costs of all parties to come out of the estate.

Earl of Derby *versus* Duke of Athol, *February* 8, 1748-9. Case 106.

THE bill was to have a discovery concerning the general title of the *Isle of Man*, and to have relief on a particular point of equity relating to the rectories and tithes within that island; which equity was, that in 166-, Lord *Derby* granted the rectories and tithes to the bishop and clergy there, and for the enjoyment thereof gave some lands in *England* as a collateral security. To introduce this equity the bill charged, that although it was pretended, that the bishop and clergy were evicted, yet it was by collusion between the defendant and them in order to affect the collateral security: and that the defendant made them in allowance in the mean time equivalent to the profits.

On a plea to the jurisdiction it must be shewn what other court has jurisdiction.

To have a discovery therefore of this matter, and relief against this attempt to charge the collateral security, was the bill brought, as not being damnified with respect to the enjoyment of the tithes, *&c.* or if damnified, it was by their own default.

The defendant pleaded in general to the jurisdiction of the court: that the *Isle of Man* was an ancient kingdom, not part of the realm, though belonging to the crown of *Great Britain*; and that no lands, *&c.* there, ought to be tried or examined into here: demanding judgment whether he should be put to answer further.

LORD CHANCELLOR.

This comes to be of great consequence to all the courts in *England*. There are two general questions on this plea; first, whether the plea is good in point of form; not a trifling form, for if the objection thereto on the part of the plaintiff be right, it is material to the nature of such plea? Secondly, whether good in substance?

As to the first, it is objected for the plaintiff, that although it is shewn in the negative and alledged, that this court has no jurisdiction over the *Isle of Man*, and that it is not to be tried here: yet it is not shewn in the affirmative,

mative, what other court has juriſdiction, or that there are any courts in the *Iſle of Man* holding plea thereof: and the rule is inſiſted on, that whoever pleads to the juriſdiction of one of the King's ſuperior courts of general juriſdiction, muſt ſhew, (y) what other court has juriſdiction. I am of that opinion; and that for the want thereof the plea is bad, and ought not to be allowed, if nothing more is in the caſe; as it is expreſsly laid down in 2 *H.* 7. 17. *a.* and *Doctrina placitandi* 234; and agreeable to the general rule of pleas of this ſort, as in the pleas of abatement, wherein it muſt be ſhewn, the plaintiff may have a better writ. The reaſon of this is, that in ſuing for his right, a perſon is not to be ſent every where to look for a juriſdiction, but muſt be told, what other court has juriſdiction; or what other writ is proper for him: and this is a matter, of which the court, where the action is brought, is to judge. There are not many authorities on this head, but in the old books of *entries* the form of pleading is ſo: and the opinion of *Popham C. J.* in *Yel.* 13. and *Fitz. Ab. Tit. Juriſdiction,* concerning *Wales*; and although Lord *Vaughan* may have denied that to be law: he was a very ſtrong *Welſhman,* as appears throughout his argument; in
(204) which though there is a great deal of good and uſeful learning, yet it never was delivered, though intended to be ſo. It is ſaid to this, that the court ought in this caſe to take notice of what is the juriſdiction: that the matter of fact is ſhewn; and it is likened to the caſe of inferior courts; wherein it is ſufficient for the defendant to plead, that the cauſe of action aroſe out of the juriſdiction of that court: but I cannot put this (which is a ſuperior court of general juriſdiction, in whoſe favour the preſumption will be, that nothing ſhall be intended to be out of its juriſdiction, which is not ſhewn and alledged to be ſo) upon a level with an inferior court of a limited local juriſdiction; within whoſe juriſdiction nothing ſhall be intended to be, which is not alledged to be ſo. 1 *San.* 74. I was deſirous to be informed, how the pleas were in this court, which are looſer than at law; and no caſe has been cited, in which the plea to the juriſdiction of this court has not given juriſdiction to another, as to a viſitor, *&c. Att. Gen.* v. *Talbot, March* 21, 1747, and *Strode* v. *Little,* 1 *Ver.* 58. But the caſe in 2 *Ver.* 494. of the *Iſle of Sarke* is very material, and comes neareſt to the preſent caſe; where another juriſdiction,

(y) 1 Vern. 59. And may demand judgment of the court, whether he ſhall be compelled to anſwer the bill. Chan. Pleas. 80. Plea to the juriſdiction of a general court, muſt ſhew where the juriſdiction veſts, as well as negatively, that it is not theſe; *ſecus* of inferior courts. 2 Vol. 357.

tion, where juſtice might be had, as being parcel of *Guernſey*, was ſhewn. The plea therefore is not to be ſupported on this point (z.)

But ſecondly, to conſider it on the merits and ſubſtance: the general averment, that no land, rectory, *&c.* there is examinable in this court, is not true or well founded, but laid down much too large; becauſe upon an equitable right to this iſland, and both parties reſident within the juriſdiction of this court, (a) it might be determined here. The queſtion here is, to the right and title to the whole iſland, which cannot be determined in the courts of *Man*; becauſe that would be permitting the perſons, who claim the ſeigniory of the *Iſle* to judge in their own caſe: then there muſt be ſome court or other here to determine that right; either this court, or the *King's Bench*, or the *King in council*. Caſes may be put, in which this court and the *King's Bench* both have juriſdiction concerning the right to the *Iſle*. As upon a *ſcire facias* to repeal letters patent granted of this whole *Iſle*: it comes to this then, that here is a queſtion concerning the title of this whole *Iſle* brought in judgment by this bill: but it is a queſtion of law, not of equity, and therefore this amounts only to a plea for want of equity; for if ſome court here muſt determine it, the queſtion is, which? and if it was a queſtion of equity, it would certainly be this court, although it was of a matter out of its juriſdiction; as in the caſe of the *Iſle of Sarke*. So that upon a mortgage made of this *Iſle*, and both mortgager and mortgagee reſident within the juriſdiction of this court, upon a bill concerning it, the court would hold juriſdiction of it; (b) for a court of equity *agit in perſonam:* and then I will never ſuffer a plea for want of juriſdiction in the court. But there is another point, as to the rectory and tithes, which is mere matter of equity as ſtated in the bill: the relief prayed againſt the collateral ſecurities being burthened by this colluſive damnification: and if it be ſo, the plaintiff may have a very proper caſe; but whether it is ſo ſtated as to be ſufficient to intitle to relief, is not neceſſary to determine on a plea to the juriſdiction. But ſuppoſing all this out of the caſe, in reſpect of the diſcovery, there is no colour to plead to the juriſdiction. The *Iſle of Man* is ſubject to ſome court in *England:* then the plaintiff may come here for aid to diſcover

A queſtion concerning the right and title to the *Iſle of Man* may be determined here.

(205)

(z) 2 Vent, 362.

(a) But the laws of England do not extend to it, unleſs expreſsly named, 2 Vol. 350.

(b) 4 Inſt, 231. Poſt 447, 454.

his title; for he may bring a general bill for diſcovery, without ſetting out his title: and upon a plea to the diſcovery and relief both, it may be allowed as to one, and over-ruled as to the other. Then ſuppoſing the juriſdiction to be in the *King in Council* (although I do not know, that it has been ſhewn to be ſo) a bill may be brought for a diſcovery of ſuch title, and the court ought to give that diſcovery; becauſe the *King in Council* cannot do it, nor compel the defendant to anſwer upon oath: although in ſome caſes the court will not lend its aid to a diſcovery; as not to aid the juriſdiction of an inferior court; and I have heard it ſaid, not of an *Eccleſiaſtical* court. The true reaſon is, that it is not wanted there; for they may compel an anſwer. But I will not hold the juriſdiction of the *King in Council* to be of ſuch a nature, as to be below the being aided by this court to give relief to come at that diſcovery: as it muſt be determined in ſome court, the plaintiff is intitled to come here to have that diſcovery. Suppoſing then the objection for want of form out of the caſe, I muſt have over-ruled it as to the whole diſcovery, becauſe it was a proper matter for relief: the queſtion then comes to this; whether ever the court divided a plea to the juriſdiction? Of late indeed upon a bill for ſeveral matters of diſcovery and relief, if there be a plea to the whole bill, which is a proper bar to part, (c) the court divides it, and lets it ſtand good as to part; * although upon demurrer the court over-rules it (d) wholly: but no inſtance, that where a plea covered too much, the court ever divided it.

A plea may be allowed as to part: not ſo of a demurrer.

Caſe 107. Kemp *verſus* Squire, *February* 10, 1748-9.

Diſcretionary in the court to ſet aſide inrollment of a decree on circumſtances. As when plaintiff continued an infant till near the time of hearing or being beyond ſea, and the cauſe neglected by the ſolicitor ſo, that the merits not heard.

THE plaintiff (e) continued an infant from the beginning of the ſuit till within ſix weeks of the pronouncing the decree; and petitioned to have the inrollment of that decree ſet aſide, becauſe of the great neglect of the ſolicitor employed by him.

Lord

(c) 1 Atk. 53. 2 Vol. 108. 3 Atk. 70. Moſ. 40.

* Though there cannot be two demurrers to the ſame bill, yet there may be one to the original, and another to the amended bill. 2 Brown 66.

(d) There is no ſaving any thing on a demurrer. 2 Vol. 110.

(e) Supra. 245. Prec. Chan. 134. 2 Ch. Rep. 128. 2 Vern. 403. 2 Wms. 73. 3 Wms. 111, 371.

Lord Chancellor doubted, whether it was in the power of the court to open this inrollment on any terms; for if it was, he was of opinion the court ought to do it on the circumſtances of the caſe; and deſired precedents might be ſearched.

Two were now procured; the one *Robſon* v. *Cranwel*, *December* 8, 1731, before Lord *King*; where a bill was brought by a perſon of full age, who left money with his ſolicitor to fee counſel, and went beyond ſea. A *Subpœna* was ſerved to hear judgment; but the ſolicitor not employing counſel, the bill was diſmiſſed with coſts. It was held a bare diſmiſſion by default: and the court, upon the plaintiff's paying coſts, opened the inrollment, and ſet aſide the order; giving the plaintiff leave to make out the merits, and apply to rehear. (206)

The other was *Benſon* v. *Vernon*, *November*, 1745, in the *Houſe of Lords*, where the plaintiff filed a bill in the court of *Exchequer* in *Ireland*, to foreclоſe the equity of redemption of an eſtate. Captain *Vernon* brought a croſs bill to impeach the mortgage for fraud: and ſerved *Benſon* in *England* with proceſs to anſwer, and a commiſſion prayed to take his anſwer in *England*: upon *Benſon's* taking no notice of what paſſed in *Ireland*, it was ordered, that the croſs bill ſhould be taken *pro confeſſo*; and the original diſmiſſed. An anſwer was afterward put in by *Benſon*, and application made to the court to reverſe that order, and to ſet aſide the proceedings as irregular; which were reported by the *remembrancer* to be regular, and confirmed; and the application was to ſet it aſide on another ground; of his having been in a bad ſtate of mind. But the court of *Exchequer* thought it out of its power to deprive the party of the benefit of that inrollment, which was obtained regularly. Upon appeal to the *Lords* in *England*, as the merits of the caſe had not been entered into, they ordered the inrollment to be ſet aſide, notwithſtanding the proceedings were ſtrictly regular; and that on payment of coſts the decree ſhould be opened, and opportunity given to bring on the cauſe in a proper manner.

LORD CHANCELLOR.

No irregularity or miſbehaviour in the defendant to induce the court to ſet aſide this inrollment: but any court of juſtice will incline, as far as in its power, to open what is concluded, that the merits may come before the court, and

and that the plaintiff may not be precluded from entering therein, and having juſtice done. Had the plaintiff been ſo fortunate as to continue an infant till after the hearing the cauſe, he certainly would not be bound by this: but he might, when of age, have brought a new bill, by ſhewing his caſe not to have been properly taken care of; and his caſe is very near to that. Compare this to the proceedings at common law: when a judgment is ſigned by default for want of a plea, or any other default, although the plaintiff in the cauſe is ſtrictly regular, yet will the court ſet aſide that judgment; though they will vary the circumſtances and terms on the defendant according to the caſe. But if the party immediately on ſigning the judg-
(207) ment would enter it up on record, the court would hold it more out of its power to ſet it aſide. Then a decree is of equal validity: the plaintiff's being under age in this cauſe till ſo near the time of hearing is as ſtrong an excuſe, as the plaintiff going beyond ſea pending the ſuit was in the firſt precedent.

As to the ſecond: it is objected, that *Benſon* was conſidered by the *Lords* as a lunatick; who by all laws is protected, and impliedly excepted; but the *Lords* did not conſider him as a lunatick ſtrictly; for it appeared, he did buſineſs in mean time: and though farther objected, that the court of *Exchequer* in *Ireland* could not do it; but that it required a ſuperior court, the *Houſe of Lords*, I am unwilling to give into that notion; for a court holding plea by *error* or *appeal* is to judge by the ſame rules as the inferior court from whence it comes; the rules of law and equity being the ſame here as in the *Houſe of Lords*.

The Houſe of Lords judge by the ſame rules as inferior courts of equity.

Both theſe precedents therefore prove it to be diſcretionary in the court, (I do not mean arbitrarily ſo) to exerciſe this power, if they ſee fit: and there are ſufficient circumſtances in this caſe to induce the court to do it: but on payment of the coſts of the day, *&c.*

Let the inrollment be diſcharged, and the plaintiff be at liberty to apply for rehearing.

Caſe 108. Medlicot *verſus* Bowes, *February* 22, 1748-9.

DOCTOR BOWES by his codicil deſired his ſiſter *Jane*, out of the money given her by his will, to leave 500*l.* at

at her death to her nephew *Dawſon*, who ſurvived the teſtator, but died before *Jane*.

This bill was brought by his repreſentative againſt the repreſentative of *Jane* for this legacy out of the perſonal aſſets of *Doctor Bowes*.

Teſtator by codicil deſires *A.* out of the money given by the will to leave 500*l.* at her death to *B.* who dies before *A.* Repreſentative of *B.* ſhall have it.

For Defendant: (f) It was admitted, that if a legacy is given payable at a future time, as when a ſtranger attains twenty one, before which the legatee dies, it ſhall go to his repreſentative: which, though doubted of by Lord *Cowper*, is now ſettled. But the queſtion is whether this is ſo veſted, that the legatee ſhall have it in all events, though he did not ſurvive *Jane:* and whether from the word *Leave* it ſhall not partake of a legacy by *Jane*, and therefore lapſe?

It was further inſiſted, that an account between *Dawſon* and *Jane* in *Jane*'s life ſhould be allowed by way of *ſet off*.

LORD CHANCELLOR.

The firſt point is very clear. *Deſire*, expreſſing the will of the teſtator, amounts to a legacy, and the word *leave* makes no difference; to leave or pay at her death being the ſame. Suppoſe *Dawſon* had ſurvived *Jane*, who had not left it to him, he would be intitled to it from the original teſtator, not from *Jane:* and then his dying in her life makes no difference; for it has been often determined, that if there be a legacy out of perſonal eſtate payable on contingency, notwithſtanding the death of the legatee before the contingency, it is ſtill a clear demand.

No ſet off allowed where the demand is in *Auter Droit*.

As to the ſecond point: this is a demand in *auter droit* out of the eſtate of *Doctor Bowes:* and the court will not mix demands, by allowing an unliquidated account between *Dawſon* and *Jane*, by way of *ſet off*; which the court would not ſuffer before the acts of parliament allowing *ſet off*; nor do thoſe acts extend to it; not allowing a *ſet off*, when the demand is in *auter droit*. So that if an action at law is brought againſt an executor, for a demand due

(f) Legacy given to the children of *D.* after the deceaſe of annuitant, in whoſe life ſix children died, the legacy was veſted and a child born after the death of teſtatrix, but in the life time of annuitant, was let in to take. 1 Brown, 386, 181. Ante 59, 44.

due from the teſtator, he cannot ſet off againſt that a debt due from the plaintiff to him.

Caſe 109. Emperor *verſus* Rolfe, *February* 24, 1748-9.

Portions in a ſettlement by a term after mother's death for defendants, to grow due and payable at twenty-one or marriage, &c. one daughter having, after twenty-one and marriage, died in life of mother, her portion ſhall go to her repreſentatives, and not to her ſiſter.

IN a ſettlement a ſum of money was provided by a term after the mother's death for daughters portions, to grow due and payable at twenty-one or marriage: and if any of them ſhould die, before their portions became due and payable, it ſhould go to the ſurviving daughters, with directions to the truſtees for maintenance, till the ſum grew due and payable.

There were two daughters: both attained twenty-one, and married: but one of them dying in life of the mother, the other claimed the whole ſum by ſurvivorſhip againſt the children and repreſentatives of the deceaſed daughter, as not being a veſted intereſt till the mother's death.

LORD CHANCELLOR.

This is a very harſh demand: that a child living till twenty-one, marriage, and that with conſent, having children, and all in dependance upon that portion, ſhould by dying in the life of her mother abſolutely loſe it; which could never be the intent. Thoſe times of payment were inſerted to declare, that it ſhould then become payable, and not to be raiſed or burthen the eſtate before, if the child did ſurvive the mother. This is not a queſtion of
(209) raiſing it to the prejudice of the eſtate: but whether, after it has come into poſſeſſion, it ſhould ſink into the eſtate; for which there is no colour; becauſe the parties having declared in what contingency the term ſhall ceaſe, the court will not carry it further, and ſay it ſhall ceaſe on any other. Then it muſt be in truſtees for the benefit of ſomebody: and the queſtion is, for whom? It never could be intended, that by the death of one daughter in the life of the mother, that branch ſhould have nothing out of the eſtate. Then on the conſtruction of the words *due and payable*, as well as on the nature and reaſon of the thing, and alſo from their uſe in other parts of the clauſe, they muſt be relative to the times before fixed, twenty-one or marriage: though indeed it cannot be raiſed till after the term come into poſſeſſion: but that is not for benefit of the

the one or the other daughter; but of the remainder man.

Coleman *verſus* Seymour, *February* 24, 1748-9. Caſe 110.

A Man deviſed to his daughter *Jane*, wife of *Coleman*, 3000*l.* for the uſe of her younger children, to be by her diſtributed among them in ſuch manner, ſhares, and proportions, as ſhe ſhall think fit: and if no appointment was made by her, then equally to be divided among her younger children; and to ſurvive, if any of the children died under age or unmarried.

3000*l.* deviſed to *Jane* wife of *C.* for the uſe of her younger children as ſhe ſhould appoint, *&c.* It is a preſent legacy, veſted in thoſe then born, though ſubject to her variation, and not to be extended to thoſe by a future huſband.

The firſt queſtion was, whether the legacy ſhould be for thoſe younger children only, which ſhe had at that time by that huſband; or whether the younger children by any future huſband ſhould alſo take?

It was argued, that though there was ſome variety of opinions, whether *children* ſhould extend to thoſe born after the making the will: yet never whether to thoſe born after death of the teſtator: unleſs there are future words, when from neceſſity the teſtator muſt have had future children in view. In general children unborn are preſumed to be meant: unleſs indeed the wife had no younger children at the time; but in the preſent caſe ſhe had.

Againſt this it was ſaid, the legacy was to all the younger children in general. There are three periods of time, on which theſe queſtions turn; children at the time of making the will, or the death of the teſtator, or at a particular time when the money ſhould be paid to them; as was determined by his *Lordſhip* in a late caſe: when a middle way was taken, that the teſtator meant, it ſhould be confined to thoſe who were born at the death of the perſon, who had it during life, and that it ſhould neither extend to thoſe to be born at any time, or confined to thoſe born at the making. But the general argument, upon which the court has gone to confine it to any particular period, is taken away here, by the teſtator's having in view a poſſibility of the diſtribution, waiting till death of the mother, who may ſtill ſuſpend the appointment. Nor is it natural by ſuch a general deſcription to have in view the providing for thoſe then born.

Elliſon *v.* Airey. Ante.

Another

Another queſtion was between the children then living: whether *Edward*, who at the teſtator's death was a younger child, but ſince became the elder, ſhould ſtill be held a younger; for that, unleſs the mother ſhould appoint, it ſhould wait till her death, what younger children ſhould take; at which time he was the elder.

LORD CHANCELLOR.

There is little doubt, although the intention of the teſtator is not very clear. There have been different determinations of theſe ſort of caſes: whether *children or younger children* ſhould relate to thoſe born at the making the will or after the will; or farther in life of the perſon in whoſe power it was committed for life; and no general rule has been laid down, but always conſtrued according to the particular words, the circumſtances, and view of the teſtator. I am delivered from any difficulty, which would have ariſen, had there been any children by *Coleman* born ſubſequent to the making; for they were all born there.

As to *Edward*, he was a younger child at making the will, and death of the teſtator; and muſt be conſidered as a younger child, notwithſtanding the accident that has happened ſince of the death of the elder: and there are ſeveral inſtances, in which ſuch a child, who was then a younger, has been intitled both to the portion of a younger child and a ſettled eſtate alſo.

Where an elder child is conſidered as a younger.

As to any children that may be born of a ſecond marriage: they could not be intended; for ſhe having four children by *Coleman* at the making the will, if after his death ſhe married a ſecond huſband, having a great eſtate ſettled on the elder ſon of that marriage, that ſon within the deſcription of a younger child would have been contrary to the intent. But the words could not take in the children born ſubſequent to the making, or death of the teſtator; being a preſent legacy. It might be different had he given it to her for life, and afterward to her younger children: becauſe then it would be contingent, and a deviſe over: but here it is in preſent; and the ſame as if he had ſaid, equally to be divided unleſs ſhe appoints; being a veſted intereſt and immediate gift to them, ſubject to the power of variation given to the mother. Nor does the clauſe of ſurvivorſhip make any difference, being ſtill veſted: this legacy then both in the intent and words is preſent to them, and not to be extended to thoſe born after his death; and it

(g) 2 Brown, 38. 2 Vol. 203.

it can only mean children living at the making of the will, or at farthest at the death of the teſtator.

As to the intereſt: it cannot be given earlier than from one year after the death of the teſtator; * which has not been carried further than in caſe of a father giving a legacy to a child: but this being a preſent legacy, and veſted, (h) the intereſt ſhall not accumulate, but go in mean time among thoſe intitled to the principal for maintenance, till the mother executes the appointment; which ſhe may ſtill do in a reaſonable proportion, ſo † as not to give an illuſory ſhare to one; which the court would correct, as different from the intention.

Intereſt of a legacy from one year only after teſtator's death, unleſs by a father to a child.

Where intereſt of legacy ſhould not accumulate.

Mother having power of appointment, cannot give an illuſory ſhare to one.

Martin *verſus* Martin, *February*, 1748-9. Caſe III.

ACTIONS at law were brought by ſeveral bond-creditors againſt an heir at law, who was alſo deviſee. A bill in this court was alſo brought againſt the heir at law by other bond-creditors, in behalf of themſelves and the other creditors, to have ſatisfaction out of the real and perſonal aſſets: a decree obtained by them; an account of the debts directed, and a ſale of the real aſſets deſcended, in order to a ſatisfaction of theſe demands.

Bond creditors of the anceſtor obtain a decree for ſale againſt the heir; an injunction will go againſt other bond creditors proceeding at law; unleſs they obtain it before the decree.

The heir at law brought a bill to have an injunction to reſtrain thoſe bond-creditors, who ſued at law; for that after a decree for a ſale, there was no inſtance of creditors being allowed to proceed at law to affect that eſtate, when the fund itſelf, by which ſatisfaction was to be made to the creditors, was taken from the heir at law, who was brought before the court in reſpect of his title only, not his perſon.

On the other hand it was ſaid, that the ſenſe of the court always was, that it was out of its power to take away any remedy from a creditor; to prevent the miſchievous conſequences

* 2 Brown, 58.

(h) Truſtees to apply intereſt for childrens maintenance till 21, and on their attaining their ages of 21, equal ſhares of the principal to be transferred to them, the intereſt accrued between the elder and younger children coming of age, decreed to be divided between them. 1 Brown, 335.

† Unleſs there is great miſbehaviour. Ante, 59.

conſequences of one creditor's chalking out a method, by which the reſt muſt proceed; for then it would be eaſy for the heir at law to ſingle out one creditor, and get him to bring a bill againſt him for that effect.

(212) LORD CHANCELLOR.

The juſtice of the caſe is very clear. It muſt be conſidered, what is the rule of proceeding in this court and at law againſt the heir. To clear the way it is neceſſary to conſider, in what reſpect the caſe of an heir at law, charged for a debt of his anceſtor by ſpecialty, is like the caſe of proceeding againſt an executor or adminiſtrator: and in what they differ. In both caſes the court aims at equality of ſatisfaction as far as poſſible. In the preſent conſtitution of the law of *England*, both in this court and courts of common law, there is ſome confuſion and inconvenience in reſpect of the adminiſtration of aſſets both real and perſonal: and therefore it has been deſired, that a new proviſion ſhould be made by the legiſlature concerning it. A direction was given to the judges, that a bill ſhould be brought in as to the perſonal aſſets: and a ſhort bill was brought in upon the caſe of *Morrice* v. *The Bank of England*, but laid aſide from the difficulty, and the time: but that equality, as far as it can be brought within the rules of law and equity, is what is aimed at.

The court aims at equality of ſatisfaction in adminiſtration of aſſets.

Caſ. Tal. 217.

To conſider in what reſpect they differ. In reſpect of the nature and ground of the charge againſt each; which, as to the executor or adminiſtrator, is not quite as ſtanding in the place of the teſtator or inteſtate, but in reſpect of the eſtate come into their hands; and therefore the charge is in the *detinet* only, not the *debet*. In an action againſt the heir at law for a debt of his anceſtor upon ſpecialty, the ground of the charge is, that he is bound as well as the anceſtor; and therefore it is in the *debet* and *detinet*, as it would have been againſt the anceſtor: and the law gives him liberty to diſcharge himſelf by pleading *nothing by deſcent*, or *but ſo much*; which plea if found falſe, he is charged as a perſon bound for the whole debt, if he had but one acre: which is not the caſe of an executor, who is charged only for ſo much as comes to his hands, notwithſtanding ſuch plea found falſe.

In what reſpects the proceedings againſt heir for debt of anceſtor agrees with or differs from the proceedings againſt executor or adminiſtrator.

Poſt. Johnſon v. Mills.

Then to conſider in what reſpect they are like. In actions at law againſt executor or adminiſtrator by ſeveral creditors, he may confeſs judgment, to which he pleaſes, though

though to one who brought his action ſubſequent to the reſt, and may plead that judgment againſt the others, and that he hath nothing farther, and ſo diſcharge himſelf. Then where one creditor ſues at law, and another by bill in equity, the executor has then no remedy, though a decree is obtained here; for he cannot plead that decree at law; becauſe the courts at law do not give allowance to it. So that though the decree is obtained here firſt, yet the creditor at law may proceed againſt him, and take the aſ- (213)
ſets out of his hands; and the executor has no other remedy than to bring a bill here ſetting forth that decree, and to obtain an injunction againſt that other creditor to ſupport the decree of this court, and to prevent a double charge: during the courſe of theſe two cauſes, the executor cannot bring a bill for an injunction; as the court cannot tell which will obtain judgment firſt; for if the creditor ſuing at law does, he muſt be firſt ſatisfied, as he will then gain a preference in courſe of adminiſtration both in law and equity. But if the decree is firſt obtained, the court will then reſtrain; which was the ground of the caſe of *Morrice* v. *Bank of England:* for had not the creditor, who ſued in this court, obtained a decree firſt, and the *quantum* of the demand been thereby aſcertained, the court would not have interpoſed by injunction againſt the other creditors as it did; which was affirmed by the *Lords*, an injunction being the only method by which the court can eſtabliſh its decrees. So if ſeveral creditors proceed in this court for ſatisfaction by different bills: the court will not ſtop the ſuit of one, becauſe of the pendency and priority, which may be gained; although this creates an entanglement and difficulty upon the eſtate. Accordingly in ſuch a caſe of five different bills againſt an executor, who was ready to adminiſter the aſſets, and applied to the court to have them all heard together; for that purpoſe Sir *Joſeph Jekyl*, who was willing to attain that equality, poſtponed the cauſes, which order, upon motion to Lord *King*, was diſcharged; for that before a decree obtained, the proceedings in law or equity could not be ſtopped, or the chance prevented of gaining a priority in point of payment in the adminiſtration of aſſets: but he did not doubt the granting an injunction, if a decree was obtained; becauſe the executor could not plead it at law; which is the caſe here.

Then conſider, how it ſtands as to the heir at law; who is alſo deviſee in the will: but that makes no difference; for a deviſe to the heir at law is conſidered as land deſcended in this court; and does not want the aid of the

Statute

Statute of frauds. It is ſaid, that during the courſe of the cauſe the heir at law applied for an injunction, which was diſſolved: and therefore it would be inconſiſtent in the court to grant one now. But there is no inconſiſtency, upon the principle of comparing it to the caſe of an executor or adminiſtrator; becauſe it was during the courſe of the cauſes, when there was no ground to grant an injunction; as the judgment at law might be obtained before the decree here, and thereby gain a preference. But now the court is to ſupport its own juriſdiction, and give the benefit of the decree, which is obtained, to the creditors intitled to it, and conſequently by injunction or order reſtrain the others from proceeding at law.

Conſider it on the common ground of a decree, for ſale for ſatisfaction of a bond-creditor; not only where it is in behalf of himſelf and others, but even where the bill is (214) for ſatisfaction of his own particular debt: the conſtant courſe of the court being to direct an account of all the bond-debts of the teſtator or inteſtate, with liberty to come for a ſatisfaction: without which no decree for a ſale can be; for as they have all a lien againſt the heir, who is bound as well as the anceſtor, they are all intitled to receive ſatisfaction, and might otherwiſe ſue at law notwithſtanding the decree for ſale by this court: but it would be very miſchievous, ſhould the court ſuffer another bond-creditor, who has not obtained judgment, after a decree for ſale, to proceed againſt the eſtate: as the effect of a ſale could not be had during the continuance of the *levari* on the judgment; which muſt be removed in order to a ſale. The court cannot by an order iſſuing out of this decree compel that creditor, who has got a legal title in his own right, to join in a ſale, as it may a truſtee: nor need a new bill be brought to compel him, as it may be better done now, and with leſs expence, when all parties are before the court. I will give an inſtance, wherein the court would relieve the heir, notwithſtanding the bond-creditor had a clear remedy at law. The *ſtatute* has changed the law, not only with regard to lands deviſed, but lands deſcended: in an action by a bond-creditor before the ſtatute, if there was an alienation before the *teſte* of the original writ, *riens per deſcent* at the time of the writ purchaſed was a defence, and then no ground at law to charge with the value; which is altered by the ſtatute. If then the court has decreed a ſale, in which the heir has joined, and another bond-creditor brings an action at law to have ſatisfaction out of it upon his pleading *riens per deſcent*, according

cording to that alteration he will be charged with the ſum of money, for which the eſtate ſold, he having joined in the conveyance: nor would the common law court take notice that it was done by ſale of this court: but upon a bill by the heir at law, he would have an injunction; otherwiſe it would be a great hardſhip on him; for after recovery againſt him for the value of the lands deſcended, he muſt take his chance, whether the lands decreed to be ſold would ſell for ſo much as he is obliged to pay.

(i) But the chief conſideration is the impoſſibility to have ſatisfaction, unleſs the court ſupports its decrees; the principle of which is, that the court does not take away the priority of a creditor; but only ſupports its rule, (k) that a decree of this court is equal to a judgment at law: and then a preference will be given in priority of time only, as in judgments in the courts at law. It is juſt therefore to grant an injunction now, and not to put the heir at law to bring a new bill. And the court will take notice, that upon that judgment recovered this equity ariſes.

Decrees equal to judgments at law.

(215)

Jthell *verſus* Beane, *February* 28, 1748-9. Caſe 112.

A Man who had a ſon by a former wife, going to marry a ſecond with a portion of 260*l.* in conſideration thereof ſettles 400*l.* that if ſhe ſurvived him, or had iſſue by the marriage, the heirs or executors of the huſband ſhould after his death pay 400*l.* to the truſtees for the benefit of the wife for her life, and after her death for the iſſue of her marriage, together with the ſon by the former wife; which ſon happened to be the only ſurviving perſon: and his father deviſed all his eſtate to him ſubject to payment of debts.

The bill was brought by the father's creditors againſt this deviſee and heir at law; who admitted, there was no freehold, but only copyhold, lands.

Lands deviſed ſubject to debts: defect of ſurrender of copyhold ſupplied; there not being any freehold.

The firſt queſtion was, whether a defect of ſurrender could be ſupplied?

Lord

(i) 2 Salk. 507. 2 Vern. 89 Prec. Ch. 79.
(k) This muſt be intended only of the perſonal eſtate, a decree acting in perſonam, not in rem. 2 Wms. 621. Poſt, 496.

Lord Chancellor was of opinion, it ſhould; to ſupport the intent of paſſing ſomething: but otherwiſe had there been freehold lands.

The ſecond queſtion was, ſuppoſing they paſſed, whether one of the creditors to whom the ſon had mortgaged theſe lands ſhould retain them by way of ſecurity for his own debt, as well for the old debt as for the money lately advanced?

Purchaſer or mortgagee not to ſee to application of the money where no ſchedule of debts.

Deviſee in truſt for payment of debts, mortgages the eſtate to one of the creditors, who ſhall not retain it for his former debts, but come in *pari paſſu*.

Lord Chancellor was of opinion, that though the general rule was, * that a purchaſer or mortgagee need not ſee to the application of the money, where no ſchedule of the debts; yet this rule was never carried ſo far as to put it in the power of the deviſee in truſt, or of the heir at law, who in this court is conſidered as a truſtee, to favour one creditor; which would be the conſequence, if this was allowed. All that the court can do for the mortgagee (who is not bound by the admiſſion, that there are no freehold lands, and may have that inquired into, if he will) is to allow him the principal and intereſt of the money he advanced to the ſon: but as to his old debt, he cannot be put in a better condition; but muſt come in *pari paſſu* with the reſt of the creditors. This is not like the caſe of an executor, who having power to adminiſter the aſſets, and the legal eſtate in him, may ſell a term; the vendee retain it; and this even to ſatisfy a debt of his own, as was held in (1) *Nugent* v. *Nugent*. But that is owing to the legal power of an executor over the aſſets; upon which the court will not break in; but never held, that if a deviſee (216) in truſt mortgaged to a creditor of his own for ſatisfaction or ſecurity of that debt, ſuch mortgagee having notice of the truſt ſhould retain the eſtate againſt the creditors under that truſt: or if he mortgages with notice by way of ſecuring the debt of the teſtator, it alters not the caſe; for the eſtate was a ſecurity in the hands of the truſtee before, and it only operates to change the courſe; which the court will not ſuffer the truſtee to do; conſidering it as a fraud, to give the preference to one creditor; which the law has not eſtabliſhed, nor will this court allow.

The

* Where land is to be ſold generally, purchaſer not bound to ſee to the application of the money, but is a mere ſtranger, *ſecus* if any ſpecific ſum is to be paid beſides to another. 1 Brown, 186.

(1) Atk. 463. there called Nugent and Giffard. Barnard. 78. 2 Atk. 41. 3 Atk. 235. 2 Wms. 148. Secus if the purchaſer colludes with the executor. 2 Vern. 616.

The next queſtion was as to this 400*l.* whether the creditors might come upon the reverſionary intereſt thereof?

Huſband on 2d marriage contracts to pay money in truſt for the wife for life, and afterward for the iſſue of that and a ſon by a former wife; his creditors cannot come upon this againſt the ſon, as being a voluntary diſpoſition as to him.

As to which *Lord Chancellor* ſaid it was more difficult; but that it would be going much too far to ſay, that it was ſubject to the demands of the creditors, and that the ſon was not intitled to the benefit of it; for it would make a dangerous precedent to families; particularly to the caſe of wives on a ſecond marriage.

It was inſiſted on to be voluntary with regard to that ſon: though not as to the wife and the iſſue of the ſecond marriage, and was likened to a bond by a father to leave a ſum of money at his death, which is a fraud on the cuſtom: and although collaterals have been held within a conſideration, yet never where creditors were concerned.

LORD CHANCELLOR.

This is different from the caſe of a bond by a father; for it is a contract between the huſband and the ſecond wife and her friends: and ſo far like *Oſgood* v. *Strode*: it being provided in the agreement, that the ſon by the former wife ſhould come in for a ſhare; which is a bargain, and for valuable conſideration; for had it not been for this proviſion, the huſband would not agree to let it go ſo far as 400*l.* This often happens on the marriage of a widow; who contracts on a ſecond marriage, to make a proviſion out of her own eſtate, after her death and the death of her ſecond huſband, for her children by a former; which may be ſaid to be voluntary; yet is reaſonable, prudent, and natural; ſeveral of which have been ſupported in this court, as proviſions for the children by the firſt marriage for valuable conſideration. If the huſband in ſuch caſes dies in life of the wife, who dies indebted: the court would not ſuffer her creditors to come againſt the children of the firſt marriage, for whom ſhe had made this proviſion, becauſe it was voluntary.

2 Wms. 245.

Jackſon *verſus* Jackſon, *March* 1, 1748-9. Caſe 113.

Deviſe of leaſehold after death of wife, to ſon *R.* for ſo many years, &c. if then

A Man poſſeſſed of a leaſehold meſſuage or tenement deviſes it "To my wife for ſo many years of the term, as ſhe ſhall happen to live; ſhe paying the rents, and keeping it in repair: and after her death, if my ſon *R.* ſhall be living, then to him for ſo many years of the

living: but if then living, and ſhould then or hereafter have iſſue male, to him abſolutely: otherwiſe over.

term as he ſhall live: but if he ſhould be living at the time of the death of my wife, and ſhall then or hereafter have any iſſue male of his body, then all the right, *&c.* therein to go to *R.* but if *R.* ſhould die in life of my wife without leaving iſſue-male, living my ſon *William*, and *William* ſhould have any iſſue-male, then to *William*," and in like manner over to another ſon. "*Item*, I give 400*l.* to *R.* to be paid him at the end of one year next after my death; and the further ſum of 100*l.* at the death of his mother:" making his wife executrix and reſiduary legatee.

R. dies in life of the wife, leaving a ſon. *And* ſhall be conſtrued *or*; and it belongs to the ſon as repreſentative of *R.* Deviſe of 400*l.* to plaintiff to be paid in a year, and the further ſum of 100*l.* at death of his mother, the 100*l.* a veſted legacy.

R. died in life of the wife, leaving a ſon: and the queſtion was, whether this leaſehold ſhould belong to *William* by the limitation over; or to the repreſentative of the wife as part of the reſiue; or to the plaintiff the ſon of *R.* as repreſentative of his father, or in his own right; it being indifferent, as he was the only child.

LORD CHANCELLOR.

It is difficult to unravel this will, but clear on the face of it, that the teſtator did not intend it ſhould go over to the younger branches, unleſs *R.* the elder died in the life of the wife without iſſue-male; and out of this to make a proviſion for *R.* and his family.

The queſtion is, whether the words uſed are capable of a conſtruction to anſwer this intent? (m) And with ſome liberty, which both courts of law and equity have uſed to attain the intent in incorrect wills, it may be fully anſwered; which muſt be by conſtruing *and* (in that clauſe, if *R. ſhould be living at death of my wife, and ſhould then or hereafter*, &c.) as if it had been *or*. The conſequence of which would be, that though *R.* was not then living, yet if he left iſſue male, he ſhould take the eſtate abſolutely.

It is objected, that by this way of conſtruing it, here is a double contingency; and then that *R.* would have the abſolute intereſt, if he was barely alive at death of the wife: but there is no ſuch inconſiſtency; for in that caſe he would have it only for ſo many years, as he ſhould live: but if he had iſſue-male, then abſolutely; and that becauſe the teſtator has ſaid ſo; and the plaintiff muſt take this

(m) 1 Wms. 343. 2 Eq. Ab. 368. 2 Atk. 643. 3 Atk. 390. 2 Wms. 346.

this in right of repreſentative of the father; but ſtill it is a proviſion for that branch of the family.

As to the 100*l.* legacy, it is plainly veſted, and the time of payment only poſtponed; for the former words *to be paid*, muſt be carried on; as they would plainly be, if turned into any other language.

Attorney General *verſus* Day, *March* 3, 1748-9. Caſe 114.

Where this court would not decree an order made on the *maſter*'s report to be carried into execution by purchaſe of land for a charity.

JOHN ELBRIDGE, being likely to die, made a conveyance of a real eſtate for benefit of a charity. Ten days afterwards he makes a will; by which he gives 3000*l.* the exact value of that land, to the ſame charity; and 250*l.* to the ſame; and gives the eſtate to Mrs. *Elbridge*, *wife* of *Thomas Elbridge*, and to Mr. *Wolner*, as tenants in common.

After his death a bill is brought for a general account, and for direction of the court for the ſettlement of *John Elbridge*'s eſtate under his will, and a decree for that purpoſe. The court directed the *Maſter* to receive a ſcheme for carrying it into execution; the foundation of part of which was to conſider, in what way the money ſhould be laid out, and a perpetual fund created for maintenance of the charity. The *Maſter* reported a ſcheme for laying out 3000*l.* in the purchaſe of theſe lands; and the 250*l.* in other lands convenient for building the charity ſchool. The caſe was ſet down for the charity, to be heard on the *matter* reſerved: and the court made a decretal order, confirming the *Maſter*'s report; that the ſcheme ſhould be approved of, and the other matters therein carried into execution; none of all which was oppoſed, but acquieſced under by *Thomas Elbridge* and his wife, who ſurvived him. After her death the preſent information was brought in behalf the charity, together with Mrs. *Hort*, adminiſtratrix of the perſonal eſtate of Mrs. *Elbridge*, to have this purchaſe carried into execution by the aid of this court, againſt the deviſee of the heir at law of Mrs. *Elbridge*, and againſt the infant ſon of Mr. *Wolner*, who was now dead, having ſettled the eſtate on himſelf in tail.

Two general queſtions were made: firſt, whether the parties are intitled to carry this purchaſe into execution by the aid of a court of equity? Secondly, whether the be-

nefit of carrying it into execution in reſpect of the purchaſe money, ſhould go to the plaintiff the adminiſtratrix, or to the defendant deviſee of the heir at law of Mrs. *Elbridge?*

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For defendant: The ſpecific execution of agreements here is not *ex debito juſtitiæ*, it being diſcretionary: and therefore if objections ariſe thereto from circumſtances of hardſhip, though not ſtrictly weighed in law or equity, the court ought not to do it. Such agreements muſt be final, and no room for repentance: the parties were not bound to this by any act; for then there would be ſome declaration in writing that the eſtate ſhould be ſold; whereas it reſts ſingly on the non-oppoſition to theſe orders. But the whole fate of the *mortmain* act depends on this; as the carrying this into execution is contrary to the expreſs proviſion, or at leaſt the general intent of the 9 *Geo.* 2. *c.* 36; ſince which no lands, or money to be veſted in lands, can be given to a charity, or land to be ſold and turned into money, becauſe of the poſſibility of its being kept ſome time in land: as was determined in *James* v. Lord *Weymouth.* But where an election is given to lay out money in lands or the funds for a charity, it may be decreed to be laid out in that which is not void; as has been determined by *your Lordſhip.* By the *proviſo* in the act, the legiſlature meant only, that if the money was actually paid, and the agreement complete, the accident of the parties death ſhould not hurt it; but not to conclude an incomplete agreement, as this is, the money not being paid. Still all the other reſtrictions will take place on this *proviſo*; ſo that it muſt be ſealed and delivered by deed indented and inrolled, *&c.* But ſuppoſe all this out of the caſe, and that at the time of bringing the bill, it was poſſible: there are circumſtances now rendering it impoſſible; for by the death of Mr. *Wolner,* one of the tenants in common, with whom the contract for purchaſe was made, it cannot be carried entirely into execution: therefore it cannot in part. The tranſaction was joint: they cannot therefore come into equity, ſingling out a divided moiety. The court cannot in this caſe make any election for the infant; which is only done where there is an abſolute neceſſity: but if the infant dies under age, there are remainders in tail, who ſurely are not bound by this agreement.

For plaintiffs: The method of carrying it into execution is, that the contracting party ſhall be eſteemed in nature of a truſtee; and then his deviſe cannot vary the right. The *ſtatute* does not abſolutely prohibit any veſting of money

ney in land for a charity. Much has been laid out in mortgages: and yet that would come within the words of the act; as in the ſtatute of *King William* 3. of *papiſts*, who cannot take a mortgage. There is no ſuch rule, that if a contract cannot be carried into execution *in toto*, it cannot in part: one joint-tenant indeed will not be bound by the contract of the other, the right of ſurvivor being prior, nor will the court carry it into execution in part: but otherwiſe of tenants in common, who muſt ſever in every action, and their contracts are two diſtinct grants; and if one of them is diſabled by any ſubſequent act, it may be executed as to a moiety. This once was money, when the parties themſelves were bound: and nothing has ſince happened by death of *Wolner* to change it. (220)

LORD CHANCELLOR.

This caſe involves ſeveral material points; ſome of them new; and if there were not ſome clear and deciſive in this caſe, I ſhould take time to conſider of the judgment I am to give.

I will ſay nothing particular of the ſecond queſtion, being merely conſequential to the determination of the firſt; for there is no caſe, where the repreſentative of the perſonal eſtate is intitled to claim the money, ariſing by ſale of the lands, as perſonal eſtate; except where one or other of the contracting parties in the purchaſe is intitled to carry it into execution in a court of equity: for where the court holds, it ought not to be executed, there is no converſion of real into perſonal in conſideration of the court, upon which that right of the executor depends; for if not effectually converted into money, it muſt be conſidered according to its original nature as real; and the heir at law muſt have the benefit. Whether there is any ſuch converſion, depends on there being an effectual agreement binding on all parties, ſo as under all the circumſtances it ought to be carried into execution upon this general principle of equity; that what is contracted for valuable conſideration to be done, will by the court be conſidered as done; all the conſequences ariſing as if it had been ſo, and as if a conveyance had been made of the land at the time to the vendee. But if the circumſtances are ſuch, that it cannot now, or ought not to be carried into execution, though once it might, theſe conſequences cannot follow; for the court muſt conſider it as land, and the money as the party's own, who was to be the purchaſer.

The

The firſt queſtion depends on two conſiderations. Firſt, whether all, that paſſed in the life of *Thomas Elbridge* and his widow, amounts to a binding agreement to thoſe parties for ſale of the lands? The ſecond, ſuppoſing it ſo, whether the court ought now to carry it into execution, becauſe of the intervening circumſtances?

Specific execution of agreement.

As to the firſt, I think it did amount to ſuch an agreement; and that if *Thomas Elbridge* or his wife were now before the court, (n) and no change in *Wolner*'s moiety, the court ought to have executed it, notwithſtanding the *ſtatute of frauds*; for though that ſtatute has provided that no agreement for the purchaſe of lands ſhall be good, unleſs ſigned by the party to be bound thereby, or ſome perſon authoriſed by him: yet on all the queſtions on that ſtatute in this court, the end and purport of making it has been conſidered, *viz.* to prevent frauds and perjuries: ſo that any agreement, in which there is no danger of either, the court has conſidered as out of the ſtatute; upon which there have been many caſes: as in a bill by purchaſer of lands againſt the vendor, to carry into execution the agreement, though not in writing, nor ſo ſtated by the bill: the vendor puts in an anſwer admitting the agreement as ſtated in the bill; it takes it entirely out of the miſchief; and there being no danger of perjury, the court would decree it. Then if the vendor ſhould die, upon a bill of revivor againſt his heir, I ſhould not doubt to decree it: although I know no caſe of it; the principle going throughout, and equally binding the repreſentatives. Then there are other caſes, well known, taken out of the ſtatute, not ſo much on the principle of no danger of perjury, as that the ſtatute was not intended to create or protect fraud. As where agreements have been carried partly into execution: although a controverſy might be afterward between the parties as to the terms, yet if made out ſatisfactorily to the court, it would be decreed, though variety of evidence might be in the caſe; in order that one ſide might not take advantage of the ſtatute to be guilty of fraud, the court would hold his conſcience bound thereby. But the preſent is a judicial ſale of the eſtate, which takes it entirely out of the ſtatute; the order of the court was not interlocutory, but made part of the decree; as it always is on the matter reſerved, though made at another day: and it includes as well the carrying the purchaſe into execution, as the eſtabliſhment of the charity; amounting to a decree

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Caſ. out of the ſtatute of frauds.

(n) 1 Brown, 396. Poſt, 279.

a decree for the conveyance of the eſtate on one ſide, and payment of the money on the other; who might be proſecuted for a contempt in not obeying that order. And it is ſtronger than the common caſe of purchaſers before the *Maſter*, who are certainly out of the ſtatute: nor ſhould I doubt the carrying into execution againſt the repreſentative, a purchaſe by a bidder before the *Maſter* without ſubſcribing, after confirmation of the *Maſter*'s report, that he was the beſt purchaſer; the judgment of the court taking it out of the ſtatute. But even in common caſes this queſtion may ariſe: as if the authority of an agent, who ſubſcribed for the bidder, not being admitted, cannot be proved. Yet if the *Maſter*'s report could be confirmed, it ſhould be carried into execution, unleſs ſome fraud; for this is all excluſive of any defence, that may ſtill be ſet up on the other ſide.

But the material conſideration is the next. Whether, as circumſtances now ſtand, conſidering the events and alteration of rights thereby, the court ought to carry it into execution? The general rule certainly is, that this is diſcretionary in the court, but will not hold in the preſent; for that is generally in caſes, where there may be an election of two remedies, by coming here for a ſpecific performance, or by action at law: whereas here there can be no remedy at law; all ariſing under the acts of this court, from that order amounting to a decree. So that if this court does not carry it into execution, it cannot be at all: yet whether other remedy or not; if there are ſtrong and material objections againſt it, the court ought not to do it. (222)

As to the firſt objection: I cannot ſay this is ſtrictly contrary to the proviſion of the 9 *Geo.* 2. called the *mortmain* act. The firſt clauſe of which was intended to relate to gifts or conveyances to a charity by way of donation. And it is plain, that the legiſlature did not intend abſolutely to forbid all kind of purchaſes of lands for the benefit of a charity; but has put them under ſome reſtrictions. The *proviſo* was inſerted in the *Houſe of Lords*, upon mention of the caſe of the charity of *Queen Anne*'s bounty; which could not otherwiſe have gone on: as the method of executing it is, that the money ariſing of that fund is laid out in purchaſe of real eſtate for the augmentation of poor vicarages. Another conſideration was, that this was not intended to prevent the execution of charities already eſtabliſhed; in ſeveral of which the funds are veſted in truſtees with intent to lay out in lands: particularly

Doctor

Doctor Ratcliff's charity: but to leave them open, reſtraining the increaſe of ſuch donations *in futuro*; that it ſhould not be in the power of any perſon, or of a court of equity, to direct ſubſequent gifts of money to a charity to be laid out in land; for if that was their meaning, they might as well have rejected the whole bill; as the conſequence would be, that a perſon might leave 3000*l.* to his executors, who might bring a bill in equity, praying a decree for laying it out in lands: Yet in this very clauſe, relating to purchaſes, it might be conſidered how far they are taken out of the ſtatute. The meaning was, that where ſuch purchaſes are made, they ſhould not be left precarious in point of time: ſo that though the party ſhould happen to die within the twelve or ſix months, yet the perſon, who paid the money, ſhould not loſe his purchaſe, or be put to riſk the recovery of it back, as there might not be aſſets, or ſtocks might fall. But then the money muſt be actually paid; in which caſe I doubt, whether the other reſtrictions, excluſive of the limitation in point of time in life of the party, will take place on this *proviſo*, and am rather of a different opinion; for ſometimes the money is paid on articles before a perfect conveyance; and then it would be ſufficiently taken out of the act, notwithſtanding the circumſtance of deed indented and inrolled, is not complied with; the intention of the act being complied with by the actual payment and converſion made of one kind of eſtate into another. But in the preſent caſe the money has not been paid.

But ſuppoſing this doubtful: conſider whether it would not be contrary to the true intent and principles of the act?
(223) Had this matter been fully entered into at the making that order, as it is now, I think I ſhould not have made it: but it paſſed *ſub ſilentio* then; the parties agreeing; and the objections not being laid before the court. There is ſomething in this caſe, which may lay a great opening to evade the act; although *John Elbridge* might not have intended any ſuch fraud: but if ſuch a precedent were made, it would be followed by a perſon, who knowing if he died within a year after the conveyance, the act would make it void, gives the exact value thereof in money the ſame way, and then the one to be laid out in purchaſe of the other. The teſtator's intent makes it worſe, and creates a reaſon againſt it: this though mentioned as a barbarous act, is quite otherwiſe, far from being a prohibition of charitable foundations, it only reſtrains this method; leaving the diſpoſition of perſonal property thereto free. The particular

ticular views of the legiſlature were two: firſt to prevent the locking up land and real property from being aliened; which is made the title of the act: the ſecond, to prevent perſons in their laſt moments from being impoſed on to give away their real eſtates from their families. The preſent caſe does not relate to the latter view; although that was a very wiſe one; for by that means, in times of popery, the clergy got almoſt half the real property of the kingdom into their hands, and indeed I wonder they did not get the reſt: as people thought they thereby purchaſed heaven. But it is ſo far from being charity or piety, that it is rather a monument of impiety, and of the vanity of the founders. As to the other view, it is of the laſt conſequence to a trading kingdom; to which the locking up of lands is a great diſcouragement. This indeed has not ſo much relation to the ſtatutes of *mortmain*, as is thought; which had another view, *viz.* of ſervices of the crown: and therefore the reaſoning producing this act is more like the political reaſoning relating to the ſtatute of *Weſtminſter* 3. of intails. Then it would be inconſiſtent with that view of the legiſlature, if this court ſhould decree this order, made on the *Maſter*'s report (which would not have been made had it then been fully conſidered) to be carried into execution in the purchaſe of land; as it would be attended with all the bad conſequences of ſuch a deviſe of land. Where ſuch a charity is created *de novo*, the better rule is to hold it to be laid out in ſome perſonal property; for which the funds are convenient; affording commonly a better and readier income than land: and it is worth obſerving, how early laws were made to prevent the miſchief of *mortmain*, *viz.* about the third *century*, by one of the firſt *Chriſtian* Emperors.

9 *Geo.* 2. 36. Vid. Dufour *v.* Motteux Poſt.

But upon the next objection there are reaſons, why it cannot be done, ſuppoſing the reſt out of the caſe; as things now ſtand, it cannot be executed entirely, and then not at all. For upon *Wolner*'s death, his part is gone over to his iſſue in tail, an infant; againſt whom the court cannot decree it: as it is admitted, the court could not, if he was of full age; becauſe it has been determined, that on a bill to carry into execution a contract for the purchaſe of lands in the life of tenant in tail, the court would decree him to execute it and to ſuffer a recovery. But if he will not, chuſing to lie all his life in priſon, as Mr. *Savil* did, the court cannot carry it into execution againſt the iſſue in tail, claiming paramount *per Formam Doni*. It is admitted, that if the bill was on the other ſide

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by

by the preſent defendant or ſurviving tenant in common, for an execution as to a moiety, the court would not execute it againſt the purchaſer; becauſe it is different from what was contracted for: as his meaning might be to have the entire eſtate: and the court pretends to decree in *ſpecie* only; which the decreeing half would not be. On the other hand; if on the death of one of the tenants in common, who contracted for a ſale of the eſtate, the purchaſer brings a bill againſt the ſurvivor, deſiring to take a moiety of the eſtate only, the intereſt in the money being divided by the intereſt in the eſtate, I ſhould think (though I give no abſolute opinion as to that) in the caſe of a common perſon he might have a conveyance of a moiety from the ſurvivor, although the contract cannot be executed againſt the heir of the other. But this is not the caſe of a private perſon, but of a charity; for which the court muſt judge, and will not decree the money to be laid out in the purchaſe of an undivided moiety of an eſtate; obliging the charity to become tenant in common with a private perſon; whereas the reaſons for laying it out were to have it entire: nor is any eſtate ſo inconvenient or intangled as this; which would not be for the benefit of the charity. Beſides the information is to carry this ſcheme into execution; which would not be done by ſuch a decree.

As to the queſtion between the repreſentative of the real and perſonal eſtate, it is but a conſequence of the other point: and as this cannot be carried into execution, or conſidered as done, the plaintiff *Hort* has no right: but the heir at law muſt have it as land.

But there is another way of attaining this, *viz.* by a private act of parliament, enabling the infant to convey; for there have been ſeveral caſes, where if clearly for the benefit of the infant, acts of parliament have been made for carrying the contract of the anceſtor into execution; which would deliver me from all my difficulties: as the parties would then have the opinion of the legiſlature upon both points. And if they have any ſuch thoughts, it ſhall ſtand over; otherwiſe the bill ſhall be diſmiſſed without coſts, even againſt the infant, whom it was proper to bring before the court.

Attorney

Attorney General *verſus* Andrews, *March* 9, 1748-9. Caſe 115.

MR *Weſton* before the late ſtatute of *mortmain*, (o) made his will: and among other things gave all his copyhold lands whatſoever and whereſoever, which are or ſhall be purchaſed by him hereafter, or by any other by his direction to a charity.

He had ſome copyhold ſurrendered to the uſe of his will, and other copyhold not ſurrendered; and an information was brought for the charity.

LORD CHANCELLOR.

The extent of the deſcription ſufficiently ſhews the intent to be, that the copyhold not ſurrendered ſhould be compriſed, as well as thoſe which were: and certainly the court would ſupply the defect of a ſurrender in ſuch a deviſe as this, in favour of a younger child, beſide the paſſing thoſe ſurrendered.

The next conſideration is, whether it can have effect in point of law? To which there are two objections; upon the ſtatute of *frauds*, and upon the late *mortmain* act?

As to the latter, to lay it out of the caſe, notwithſtanding the preamble of that ſtatute, taking notice of ſuch diſpoſitions, as contrary to the public benefit; I muſt lay down the ſame rules in this caſe, as if no ſuch act had been made; becauſe this will was made before the day, on which the act took place: and all the caſes ariſing before, muſt be left on the ſame rules of law and equity; otherwiſe it would cauſe great confuſion, if thoſe wills and ſettlements made before, ſhould be conſtrued in a different way by reaſon of the ſtatute, though not affected by the ſtatute.

The queſtion upon the *ſtatute of frauds* is, whether the deviſe of theſe unſurrendered copyholds lands be good, notwithſtanding that ſtatute? In (p) *Tuffnel* v. *Page*, *April* 1740, 2 *Wms.* 262, *ceſtuy que truſt* of copyhold lands deviſed it without any ſurrender to the uſe of his will; and the queſtion was, whether the court would make that good,

(o) 2 Atk. 497 (p) Barnard, 9. 2 Atk. 37.

Truſt of a copyhold not ſurrendered to uſe of a will, deviſed by a will without any witneſs held good.

Copyhold not ſurrendered to uſe of the will deviſed to a charity held good, notwithſtanding the ſtatute of frauds, amounting to a direction to the heir to make a ſurrender; but it is alſo good by way of appointment by 43 *Eliz.* under which a deviſe of lands in tail, though no recovery is good.

good, the will having no witneſs at all: and it was held ſufficient to paſs the truſt, on the foundation of their being former determinations; holding that a deviſe of a copyhold, ſurrendered to the uſe of a will, by a will executed in the preſence of one or two witneſſes only was good: (q) the eſtate paſſing by the ſurrender, of which the will only directed the uſes; which ſhewed, that copyhold lands were determined to be out of the ſtatute of frauds; ſtanding on the ſtatute of *H.* 8. which paſſes lands by will in writing, though no witneſs at all; of which there are ſeveral caſes by Lord *Coke:* as of a will wrote, and not finiſhed; which was good for ſo much. Then there was no more ground of law to exclude a will without any witneſs at all, than a will without three witneſſes. Perhaps if theſe determinations were now originally to be conſidered, courts of law and equity would not have gone ſo far; and it may be wiſhed, it was altered, as it is ſubject to the ſame inconvenience as a deviſe of a freehold lands. But I cannot ſet up fanciful diſtinctions; nor does that being the caſe of a truſt make any alteration. Here the teſtator was ſeized himſelf: might have ſurrendered, and has not. The legal eſtate cannot paſs; the queſtion is, whether it does not amount to a direction to the heir at law to make a ſurrender to the uſe of that will; and on the foundation of copyhold lands not being within the ſtatute of frauds, but ſtanding on the foot of the ſtatute of *H.* 8. I am of opinion it does.

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But this is a diſtinct point, from the ſupplying a defect of ſurrender to the uſe of a will for a child: for which the aid of a court of equity is wanting to compel ſuch ſurrender: this being a deviſe to a charitable uſe, which will be made good by way of appointment, by the very ſtrong and general words of 43 *Eliz.* For why not as well as the want of ſuffering a common recovery of lands in tail given to a charity? Which, if not ſo expreſsly determined, has been allowed by the court, and argued from: the appointment ſtanding in the place of a recovery; not requiring the coming here, to compel the iſſue in tail to ſuffer a recovery. Conſequently here is no ſurrender wanting, as there is where the ſtatute of charitable uſes does not interpoſe: as in a deviſe to a younger child, who muſt come here for a decree to have it ſupplied. Nor will I make a decree for it; but will decree, that the truſtees for the charity be admitted.

Goodwyn

(q) Ante 12, Poſt, 489.

Goodwyn *verſus* Goodwyn, *March* 11, 1748-9. Caſe 116.

HENRY FRAMINGHAM, having uſed ſome introductory words in his will, ſhewing an intention to diſpoſe of his whole eſtate, (r) and to leave no part to deſcend; gives all his meſſuages, lands, tenements, and hereditaments whatſoever in *Norfolk* to his wife for life, if ſhe ſhould ſo long continue a widow; and after her death to his daughter *Joan*, wife of Sir *Peter Seaman*, for and during her life, and afterward to her children; to be equally divided among them ſhare and ſhare alike; and for want of ſuch children, to his right heir on the ſide of the *Framinghams*.

Lady *Seaman* had three children; a ſon *Thomas*, and two daughters; *Jane*, married to Sir *Henry Nelthorp*, and *Elizabeth* married to *Goodwyn*.

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Sir *Peter Seaman* by will gave 4000*l.* portion to his daughter *Jane*, annexing a condition thereto, that when ſhe arrived at full age, ſhe ſhould releaſe to her brother *Thomas* all her intereſt and ſhare under the will of *Henry Framingham*.

Thomas by his will gave to his ſiſter *Elizabeth* all his eſtates in *A.* in *Norfolk*, now in the occupation of *B. C.* and *D.*

The firſt queſtion aroſe on the demand of *Elizabeth*, for an account of one third part of the rents and profits of the freehold and copyhold eſtate in *Norfolk* accruing from the death of Lady *Seaman* to the death of *Thomas*, *viz.* whether the copyhold, being ſurrendered to the uſe of *Henry Framingham*'s will, was compriſed in the general words thereof?

Lord Chancellor was of opinion, that the copyhold lands were compriſed from the intent to paſs them: although there are ſeveral caſes, that a deviſe in general words of all lands and tenements will not compriſe copyhold lands, (s) which are not ſurrendered to the uſe of the will, ſo as to ſhew an intent to compriſe them. And where the

Where copyhold ſurrendered to the uſe of the will paſſed by the general words thereof.

(r) Ante, 10. 2 Vol. 48.

(s) If ſurrendered they will paſs by Will not duly atteſted to paſs lands. 2 Brown 58.

the intention of the teſtator of raiſing portions of payment of debts may be anſwered by freehold lands, the court will not ſuppoſe, he intended to paſs the copyhold: and although ſurrendered, yet if the words are not ſufficient to take them in, they will not paſs. But here they are ſufficient, and the ſurrender effectuates that intent; which appeared alſo to be, that *all* his eſtate and intereſt ſhould paſs; upon which the court has in ſeveral caſes laid great weight. As by Lord *Talbot* in *Ibbetſon* v. *Beckwith*. The conſequence of their paſſing is, that Lady *Seaman* took only ſuch eſtates, as were given by the will; and any admiſſion of hers, as being heir at law to *Henry Framingham*, could prejudice no other perſon's right.

Weight to be laid on introductory words of a will ſhewing intent to diſpoſe of all.

Then ſuppoſing them to paſs; the next queſtion was, what intereſt, after the eſtate for life of Lady *Seaman*, *Elizabeth* had, who was not then born?

LORD CHANCELLOR.

That will not vary the caſe; for wherever there is a remainder to children by a ſettlement or will, it is not material whether they are alive or not; for it will veſt in different parts and proportions, as they come *in eſſe*. Then the conſequence of the firſt opinion is, that *Elizabeth* was intitled to one third of the profits to the death of *Thomas*: and as to the intereſt theſe ſeveral children took under this deviſe, it clearly is as tenants in common for their lives only; remainder over to the heir on the ſide of the *Framinghams*: and this according to *Wild*'s caſe, which is in the ſame manner; only this is ſtronger; as *children* can
(228) be only a deſcription of their perſons; and there being no words of limitation, it cannot be carried further than for life.

The next queſtion was, upon the demand by *Elizabeth*, of the whole profits of this eſtate from the death of *Thomas* to this time, which depended on the wills of Sir *Peter* and of *Thomas Seaman*. Firſt, whether under Sir *Peter's* will *Thomas* became intitled to that one third belonging to Lady *Nelthorp* for her life, as one of the children of Lady *Seaman*, by the condition annexed to her portion?

Deviſe a ſatisfaction.

Lord Chancellor was clearly of opinion, that he was; for part of the portion having been received, it was a ſubmiſſion to the will; nor could ſhe claim both, or be now at liberty to reſort back to the copyhold eſtate: and ſo it would be according

cording to *Noys* v. *Mordaunt*, ſuppoſing it had not been annexed by way of condition.

Then the queſtion was, whether it paſſed by the will of *Thomas* to his ſiſter *Elizabeth*; there being no ſurrender to uſe of his will?

LORD CHANCELLOR.

Defect of ſurrender to be ſupplied only for wife or child.

According to the common rule, it could not: nor would the court ſupply the defect of ſurrender; it being from a brother to a ſiſter. The court has refuſed it even in the caſe of a grandchild; and only does it for a wife or child. But it depends on Lady *Nelthorp*'s taking freehold lands under the will of *Thomas*: (s) and the *maſter* muſt ſee, what is moſt for the benefit of infant children of Lady *Nelthorp* to claim by.

1 Eq. Ab. 178.

But ſuppoſing the copyhold to paſs by the will of *Elizabeth*: the queſtion is, for what eſtate and intereſt? It being inſiſted, that it paſſes in fee by force of the words *all my eſtates*: but of that I very much doubt. There are ſeveral caſes on this head; (t) and the general rule is, that the word *eſtate* includes not only the lands, or thing which is the ſubject of the deviſe, but alſo the eſtate or intereſt therein. As in the caſe of the Counteſs of *Bridgwater* v. Duke of *Bolton*. But that caſe was, where the word *eſtate* was uſed generally, *all my eſtate real and perſonal*: here the word *eſtate* is limited in point of place: (u) and though later caſes, as *Tuffnell* v. *Page*, and *Berry* v. *Edgworth*, have gone farther than the Duke of *Bolton*'s; and have held that by deviſe of all my eſtate *in* or *at* ſuch a place (between which words in *in* or *at* an idle diſtinction has been made) not only the lands themſelves, but all the intereſt therein paſſes, and ſo in 2 *Lev.* 92, by *all my tenant right eſtate*; yet there is no caſe where it has been ſo held, where there is a farther deſcription, as here, *in the occupation* of particular tenants. The objection is, that this deſcription confines it to the lands themſelves; and certainly nothing

April 1740. 2 Wms. 524. 1 Eq. Ab. 178. *Eſtate*, when uſed generally, includes not only the lands or thing, but alſo the eſtate or intereſt, ſo if *in* or *at*

(t) 2 Vol. 164, 582. 2 Wms. 490.

(u) Barnard 9. 2 Atk. 38. 3 Atk. 486. Cowper 306, 355. Douglas 734. 2 Vol. 48, 179, 614.

(x) In deviſes as well as deeds, if no words of limitation are added, deviſee takes only a life eſtate; but as no technical words are neceſſary in a will, if teſtator uſes words tantamount, as *all my eſtate*, &c. that will carry *all* his *intereſt* in the land deviſed; but there muſt be words in a will, either expreſſed or implied, to controul the rule of law. Per Lord Mansfield, Cowper 659.

such a place is added; but if it is further added in the occupation of particular tenants, Q.?

nothing was in the occupation of theſe tenants but the lands themſelves, and nothing of the intereſt or fee which was in the teſtator. Yet the anſwer given to this deſerves conſideration: that where the deſcription has been by the locality, it has been held both in law and equity to compriſe the intereſt; and there is no reaſon why the other words, in the *occupation*, *&c.* ſhould reſtrain it more than the locality, which will not. But though the eſtate and intereſt in lands is not ſtrictly local; yet is it attendant on a thing which is local. But this is alſo *eſtates* in the plural number, which in common parlance means a deſcription of the lands. As this caſe therefore is particular and new, and none have gone ſo far, I will give no opinion now: but if it be material to the parties, will make a caſe of it, or put it in ſome further method of being conſidered.

Caſe 117. Taylor *verſus* Philips, *April* 13, 1749.

Feme covert without huſband's joining, but in his preſence ſurrenders her copyhold to uſe of her will or appointment, and deviſes it. Q. whether good?

A Woman, ſeiſed of copyhold lands, marries: and during coverture, without her huſband's joining, but in his preſence, ſurrendered to the uſe of her will, or writing in nature of an appointment or will; and deviſes it to the defendant Sir *Nathaniel Edwards*.

It was argued, that a ſurrender by a *feme covert* without the huſband is void; as a fine is without his concurrence: and then his preſence or conſent in *pais* will not make it good. Then ſuch a ſurrender will not enable her to make an appointment or will: all ſuch wills are appointments, and the reaſon that copyhold is not within the ſtatute of frauds is, becauſe it paſſes by the ſurrender, not the will: and it muſt be pleaded as a ſurrender. Subſequent marriage is a revocation of a ſurrender made before, and puts her under a diſability to make an appointment. It was ſo held in *C. B.* at the *ſittings after Mich. T.* 1747: and the heir at law recovered againſt the deviſe of the wife.

For the deviſee. This ſurrender is ambulatory, as the will itſelf is, and paſſes no intereſt, at the time it is made; and not like a ſurrender to the uſe of another perſon, which takes effect immediately, and cannot be revoked. Nor does any thing paſs from the huſband; it being claimed merely under the intereſt of the wife, and after her death. If a wife levies a fine of her own lands, and the huſband makes no declaration againſt that during his life (as he may thereby avoid it) it will be good againſt her heirs, and bind

bind them. 10 *Co.* 43. *Bro.* 77. This is good as an appointment, which a *feme covert* may make; but it would have been good as a will, although thoſe words of *appointment* had not been added; for which there is a ſtrong caſe in the *Houſe of Lords*.

LORD CHANCELLOR.

That was another point. I am doubful about this, abſtracted from the cuſtom, how far this can be a good ſurrender to the uſe of the will. The perſon muſt take the lands by the ſurrender; of which the inſtrument of appointment only directs the uſes; becauſe he muſt come in under the eſtate of the lord, and by that *medium*. It makes no difference, that this paſſes no intereſt at the making; becauſe there muſt be a ſurrender of the eſtate into the hands of the lord to make it take effect immediately or *in futuro* by the appointment to be made. It is not material, whether the uſes are to ariſe immediately or by ſubſequent act of appointment; for it muſt be by the ſurrender: and in order to that, the eſtate muſt paſs into the hands of the lord; through which it muſt be taken. The queſtion then is, whether the wife can ſurrender that eſtate into the hands of the lord, ſo as to make it effectual? A fine differs from the caſe of a ſurrender; for that will be good againſt the heir by eſtoppel, although it paſſes no eſtate at all: but if a ſurrender is not good, there will be no eſtoppel, and no eſtate can paſs into the hands of the lord. If the fact concerning the cuſtom of the ſurrender was before me, I might make a caſe of it; but as it is not, it muſt be tried: but the frame of the ſurrender creates a probability that there may be ſuch a ſurrender; otherwiſe, it is ſtrange that the ſteward ſhould take it, when the huſband was preſent.

Fine by feme covert good againſt her heir by eſtoppel.

Ayres *verſus* Willis, *April* 13, 1749.

Caſe 118.

(y) A Man by his will, taking no notice of his wife's right to dower, makes a proviſion for her out of the perſonal eſtate by way of reſidue.

Deviſe of reſidue of perſonal eſtate to his wife, bars not her claim to dower.

(y) In Prec. Chan. 135, a deviſe of lands by huſband to wife, who was intitled to dower, without ſaying in recompence of it, held to be a voluntary gift, and no bar of dower: and in 1 Brown 445, huſband gave an annuity to his wife in lieu of all benefits from his eſtate. She elected her dower, but loſt the annuity. 1 Ins. Harg Ed. 36. 2 Eq Caſ. Ab. 389. 2 Vern. 365. Viner, tit deviſe, 366. 9 Mod. 152. 2 Atk. 427. In 1 Brown 292, a rent charge was held not a bar of dower unleſs ſo expreſſed, or the intention appeared by the value of the lands being too ſmall to ſatisfy both. Lord Loughborough ſaid the law is ſettled and plain, that it depends on the language of the will.

This was inſiſted upon to be an implication to bar her of dower.

LORD CHANCELLOR.

No caſe to that purpoſe. This differs greatly from *Noys* v. *Mordaunt* and the ſeveral other caſes; ſince which the rule has been, that if a proviſion (even perſonal according to latter determinations) is made for a child, whoſe eſtate by the ſame will is deviſed away, if he claims under the will, he cannot have the other; but here by the claim of dower the wife does not break in on the will; and this is the ſtronger, as it is only a reſidue, which accidental bene-
(231) fit he might intend, ſhe ſhould have as well as dower.

Legacy by a father to a child intitled to a rent-charge out of an eſtate deviſed to another, the child ſtill intitled to the rent-charge.

Suppoſe a child is intitled to a rent-charge or ſuch an intereſt out of a real eſtate belonging to his father, who makes a proviſion for him by legacy or portion, and deviſes that real eſtate to another child, without taking notice of the rent-charge: that child is intitled to the rent-charge, as the father did not ſhew any intent to exclude it; for that does not defeat the deviſe; which the court will not ſuffer.

Caſe 119. Goodinge *verſus* Goodinge, *April* 24, 1749.

Where parol evidence admitted in caſe of a will et con.

A Man deviſed a legacy to ſuch of his neareſt relations, as his executors ſhould think poor, and objects of charity. (z)

For the plaintiffs was cited *Attorney General* v *Buckland*, *June* 1742, where his *Lordſhip* held, that if the word *relations* only was in a will, it ſhould be confined to the rule of the ſtatute of diſtribution; but not where there was the addition of *poor*, *&c.* And evidence was offered to be read of the teſtator's intention not to confine it, for that though parol evidence will not be admitted in many caſes, as to increaſe

(z) 2 Vol. 216. Prec. Chan. 229. Brown 475. 2 Atk. 239, 373. 3 Atk. 258. 2 Wms. 136. 2 Vern. 376, 593. 624, 677. 2 Wms. 158, 160. In 1 Wms. 9. it was held to be dangerous to admit parol-proof where there was a written will, but as to perſonal eſtate ſuch proofs have been allowed, 1 Vern. 31, but they ought to be plain and indiſputable. In 2 Vol. 28, Lord Hardwicke ſaid, ſuch evidence has been admitted to rebut an equity ariſing from a reſulting truſt, 2 Vern. 667, but ſince Brown and Selwyn, Talb. 240. he has been tender of admitting it in ſuch caſes, but always does to aſcertain identity, or in caſe of collateral ſatisfaction. 2 Vol. 219. 1 Wils. 313.

increaſe a legacy, *&c.* * yet it may to prove the circumſtances or ſituation of the teſtator, his eſtate, or way of thinking.

But *Lord Chancellor* would not ſuffer it; for though it has been allowed to aſcertain the perſon or thing, as where two were of the ſame name; yet not to ſhew that the teſtator meant to uſe general words in this or that particular ſenſe: nor can it be read to ſhew that the teſtator was offended with any one, and ſaid, he ſhould not be included in the number of relations.

Evidence was then offered of the teſtator's having poor relations in *Salop*, and that he knew thereof: to which was objected the rule by *Holt C. J.* v. *Rawlinſon*, that the intention of the teſtator is not to be collected from collateral and foreign circumſtances.

LORD CHANCELLOR.

That rule is laid down much too large by *Holt*; for in ſeveral caſes it is admitted, that it muſt be allowed, *viz.* where the deſcription or thing is uncertain (not only where two of the ſame name) it muſt be admitted to ſhew, that the teſtator knew ſuch a perſon: as where the teſtator deſcribed a legatee by a wrong name, which ſhe never bore, parol evidence was allowed by the *Maſter of the Rolls* to ſhew, that the teſtator knew ſuch a perſon, and uſed to call her by a nick name. (a) Although parol evidence cannot be read to prove inſtructions of the teſtator, after the will is reduced into writing, or declarations, whom he meant by the written words of the will: yet that is different from reading it to prove, that the teſtator knew he had ſuch relations: to eſtabliſh which fact it may be read; but not to go any farther. And though this is a nice diſtinction, yet is it a diſtinction in the reaſon of the thing; nor can any miſchief ariſe from admitting it.

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Deviſe to his neareſt poor relations. Parol evidence admitted to ſhew that teſtator knew he had ſuch in *Salop*, but no farther; not to prove declarations or inſtructions whom he meant by the written words of the will.

It being read, *Lord Chancellor* ſaid it ſignified nothing; for that the plaintiffs could not be let in without rejecting the word *neareſt*; to which it tended by ſuch a conſtruction as it would extend to the moſt remote relations. And the bill was diſmiſſed.

* 1 Brown 448, 472. (a) 2 Vol. 527.

Caſe 120. King *verſus* Philips, *May* 1749.

IN this cauſe the queſtion was, whether the plaintiff could take as a creditor under articles, and alſo as legatee under a will? it being urged for the defendant, that the legacy was of equal value with the whole perſonal eſtate; which would defeat the intention of the teſtator of giving any thing to the other legatees.

LORD CHANCELLOR.

Account directed of teſtator's perſonal eſtate at making the will and his death; one legacy being ſo near in value as that it would defeat the reſt. Otherwiſe it might be, if it occaſioned only abatement in proportion.

This legacy being ſo near in value to the perſonal eſtate, that it will defeat the reſt, I will do what Ld. *Jefferies* and Ld. *Cowper* have done in ſuch a caſe: direct an account to be taken of the value of the perſonal eſtate at the teſtator's death, and at the making the will; which fact may give ſome light as to the intent, and is a fact neceſſary to be known, before I determine it. But if the perſonal eſtate had been ſo large, that this legacy would only occaſion an abatement in proportion of the reſt, it may be otherwiſe; for though the law leans againſt double proviſions, yet when it comes to be a queſtion between a child and other legatees or collateral relations, that does not weigh much.

Caſe 121. Sayer *verſus* Pierce, *May* 1, 1749.

Account of profits of coal mines not decreed without ſhewing poſſeſſion; the bill retained, with liberty to bring ejectment.

THE bill was for an account of coals dug: and to aſcertain the boundaries between the plaintiff's and defendant's leaſe of a colliery.

It ſtood on two foundations of right: firſt a leaſe by the late Biſhop of *Durham* to the plaintiff's father: but under that, no poſſeſſion was gained by the leſſee; who only came upon the place, and forbid the defendant from working therein. Secondly, a leaſe by the preſent Biſhop on the expiration of the former; which leaſe ſtill exiſted: but not even ſo much was done by the preſent plaintiff towards gaining poſſeſſion, as by the former leſſee.

LORD CHANCELLOR.

Can I decree an account of the profits of a colliery for a perſon, who does not do ſome act to ſhew poſſeſſion? without

without this, neither an action at law or bill in equity, can be maintained for the rents of an eſtate, whether land or a colliery; there not being a title to receive them till poſſeſſion. The defendant having got poſſeſſion, the leſſee's plain remedy was, as the mines were open, to have brought an ejectment; in which a recovery would have extended to the whole, and no need to bring other ejectments. The only ground for relief is from the confuſion of boundaries; to aſcertain which ſtill ſomething muſt be done by the court after the ejectment; and then it will be neceſſary for the plaintiff to reſort back to the court. All I can do is, to retain the bill for a year, with liberty to the plaintiff to bring an ejectment.

For defendant it was inſiſted, that the bill ought to be diſmiſſed entirely; the plaintiff not having a certain right in law. In *Strictland*'s caſe a bill was brought againſt one tenant, for pulling down an incloſure: the court diſmiſſed it with coſts, and would not retain it, or try a legal title, which ought to be aſcertained at law: although there was a ſtrong reaſon for it, as the court leans againſt pulling down incloſures: but if there was no entry, leſſee for years (according to *Plowden*) can no more bring an ejectment, than an action for the meſne profits.

For plaintiff: Where the aſſiſtance of this court is neceſſary to a trial, the plaintiff's proper way is by a bill here, and not firſt to ſue at law. So whenever the party muſt have relief conſequential upon a legal title, as if he wants a perpetual injunction, or delivery of title deeds, the legal title muſt be eſtabliſhed under the authority of this court, or all other actions before are nugatory: ſo in caſe of a will, which is a legal right; and yet any conſequential equitable queſtions are tried under the direction of this court, and no occaſion to bring an ejectment firſt. Where matter of law is joined to equitable relief, this court takes juriſdiction of the whole; as if plaintiff is intitled to a diſcovery of aſſets, ſo that it is neceſſary to come here, this will not be a handmaid to other courts: it is not proper to come here barely for a ſatisfaction of waſte, as a bill ſingly for cutting down timber; but otherwiſe if alſo to reſtrain farther cutting. Actual entry makes no difference; it not being neceſſary to give all that right which leſſee for years could convey. It has been held not neceſſary unleſs to avoid a fine; and that confeſſion of leaſe, entry and ouſter, did not confeſs actual entry, here material: but if neceſſary, that of itſelf is ſufficient ground to come

(234) come here for relief, as formerly it was for legatee to get conſent of an executor: for without leave, entry into the mine cannot be; and entry on the land ſignifies nothing.

LORD CHANCELLOR.

It is very clear, that the utmoſt I can do is, what was before mentioned. This is a caſe, in which the plaintiff wants the aſſiſtance of this court in order to try a title; there being no deeds or writings in cuſtody of defendant; in which caſe it would be inconſiſtent to bring an ejectment firſt, without the aid of this court. It is difficult to go through with an action at law in caſe of an account of the profits of coal mines; and therefore this court would go farther than in other caſes. But it is the ſame as a bill for an account of rents and profits of an eſtate, which cannot be maintained merely on a legal title, unleſs infancy or ſomething in the way, ſo that no recovery can be maintained without it. Any difficulty from the mines being unopened is out of the caſe; the firſt complaint of the bill being to the contrary. The queſtion is not, whether actual entry is neceſſary; and I deny, that without that an ejectment cannot be brought; for the common rule obliging the defendant to confeſs leaſe, *&c.* is in law ſufficient to ſupport that. An ejectment therefore would properly have determined the right; and had it been merely on the account of the profits, the bill muſt be diſmiſſed: but being to aſcertain the boundaries, the plaintiff may, if he recovers, want that relief; and then if leave be given to bring an ejectment abſtracted from the direction of this court, he muſt bring a new bill: and ſhould it be diſmiſſed entirely, he would be deprived of an injunction, if wanted.

Caſe 122. Cookes *verſus* Hellier, *May* 3, 1749.

SIR *Thomas Cookes* deviſed a copyhold, among other eſtates, to his heir at law Sir *Thomas Swynfen* for life, with remainders over; making him alſo executor and reſiduary legatee of a large perſonal eſtate. The copyhold did not appear to be ſurrendered to the uſe of the will. Sir *Thomas Swynfen* took a new infranchiſement of the eſtate from the Earl of *Plymouth* lord of the manor; in which he recited himſelf to be executor and deviſee of Sir *Thomas Cookes*. He afterward makes a conveyance, reciting the deed of infranchiſement, by which he creates a term of 1000 years

1000 years in truſt to raiſe money for payment of his debts after his death: the reſidue of the truſt to be for the benefit of the remainder man in the will of Sir *Thomas Cookes*.

The remainder man after death of Sir *Thomas Swynfen* brings this bill againſt his deviſee to have a conveyance of this infranchiſed copyhold eſtate: inſiſting that there was ſufficient ground to preſume a ſurrender, and that it was loſt, when the court rolls were burned; and that one cannot diſpute the will under which he has benefit. (235)

For defendant no evidence has been given of a ſurrender: and the mere loſs of court rolls alone will not induce the court to preſume it ever exiſted; for though a ſurrender may be preſumed, as well as any other deed, that muſt be upon ſome ground, as enjoyment, *&c.* But the acts done by him are inconſiſtent with his taking under the will, by which he had not power to do ſo; which ſhews, he claimed as heir at law, and muſt be taken to be in under his better title.

LORD CHANCELLOR.

The intent of the firſt teſtator plainly was to include this copyhold: but to make it paſs at law it ought to have been ſurrendered. The preſumption, that it was, from the court rolls being burned, is mere matter of law. (b) Nor will this court go upon preſumption of evidence, any more than a court of law. Although if deeds or writings are deſtroyed by a party, who would take benefit thereof, a court of equity *in odium ſpoliatoris* will go farther than a court of law. As in Lord *Hunſdon*'s caſe, *Hob:* and ſeveral caſes ſince. But if it be a caſual deſtruction, the evidence is the ſame here as at law. But there is another and better preſumption, from the infranchiſement, which creates a preſumptive evidence, that Sir *Thomas Swynfen* was admitted under the will of Sir *Thomas Cookes*; for it is unnatural to ſuppoſe, the lord of the manor would grant an infranchiſement till he was admitted; which might then be granted to him, if he thought fit to come under the will, as he was himſelf heir at law, and ſo no other perſon to diſpute it with him.

Evidence the ſame here as at law, on a caſual deſtruction of deeds: but otherwiſe where a ſpoliation.

(c) That a perſon enjoying a benefit under a will muſt abide by it *in toto*, has been held in modern caſes, as well in

(b) 2 Eq. Caſ. Abr. 236. 1 Wms. 733, 2 Wms. 748. Supra 389, 505, 2 Vol. 253; theſe caſes ſhew what evidence is required where deeds have been loſt, &c.

(c) 2 Vol. 33.

One taking a real or a perſonal eſtate under a will muſt abide by it *in toto*.

in taking a perſonal as a real eſtate under the will: and then his deviſee is bound by ſuch acquieſcence, and cannot diſpute it. And the evidence of this is very ſtrong; particularly from the infranchiſement; for if he had intended to take as heir at law, he would have ſtyled himſelf ſo. The objection for the defendants from the act of Sir *Thomas Swynfen* being inconſiſtent with his taking as deviſee, has ſome weight: but that very conveyance is on a recital of the deed of infranchiſement; in which he ſtyles himſelf deviſee. And his limiting the reſidue, after performance of the truſt, for benefit of remainder man ſhews, he intended the reſt of this term ſhould attend the inheritance; ſo that the plaintiff is intitled to this eſtate.

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Caſe 123.

Peck *verſus* Parrot, *May* 5, 1749.

Grant of perſonal eſtate by a deed to truſtees for a niece after the death of grantor, in whoſe life niece dies; it goes to repreſentative of niece, not to executer of grantor.

MRS. *Bouchier* by deed in conſideration of natural love and affection to her niece, and to ſecure to her ſeparate uſe her perſonal eſtate after her own death, (d) grants to truſtees all her money, ſecurities for money, and all and every other goods, chattels, wearing apparel, and perſonal eſtate whatſoever, upon a truſt to permit the grantor to uſe and enjoy, have and receive the benefit and profit thereof to her own uſe for her natural life;—and immediately after her deceaſe, and payment of her debts and funeral expences, for the ſole and ſeparate uſe of her niece alone, and not for her huſband, or at his diſpoſal, and not otherwiſe; or for ſuch perſon as ſhe ſhould appoint; her receipts to be a ſufficient diſcharge to the truſtees.

The niece died in her life: and after the death of Mr. *Bouchier* this bill was brought by her executor and reſiduary legatee for this perſonal eſtate againſt the two daughters and repreſentatives of the niece; who inſiſted, that the intent was to give the niece a veſted intereſt in this whole perſonal eſtate, after her own intereſt for life, having reſerved to herſelf only an uſufructuary intereſt for life: and therefore it would go to the repreſentatives of the niece.

For

(d) Ante, 47, 2 Vol. 118, 119.

For plaintiff: It appears from the deed to be intended a mere perſonal bounty to the niece, and not to go to her repreſentative, or any perſon but by her particular appointment, conſequently teſtamentary, and void by her dying in life of Mrs. *Bouchier*. If to be conſidered as veſted; it might have gone to the huſband, if he had ſurvived the niece, which was evidently contrary to the intent.

LORD CHANCELLOR.

This is a very particular caſe. The material queſtion is whether this deed is to be conſidered merely as a teſtamentary act, ſo that by dying in the life of Mrs. *Bouchier* that diſpoſition is at an end, and it would be in her power to make any change or alteration in it; or as a grant or diſpoſition upon contingency, not teſtamentary, but to bind her ſo that no act ſhe could do by her will, could alter it. If any circumſtances ſhewed this deed to have been obtained from her by fraud, being a mere voluntary deed, without power of revocation, that would have gone far to have ſet it aſide: but as there are no ſuch circumſtances, it muſt be taken to be fairly executed; and the intent and operation thereon to be conſidered. No other intent can appear except to bind her own hands, and preclude herſelf from making any diſpoſition to the contrary. I cannot quite ſay, it intended to give a veſted intereſt to the niece; being only the ſurplus ſhe ſhould leave at the time of her death after debts and funeral expences; and was ſo far contingent, as it was uncertain, what ſhe would leave. As to perſonal chattles in poſſeſſion, it might paſs the legal property; but not of *choſes in action*, even to the truſtees. This is different from an uſufructuary intereſt for life; for ſhe might have taken away and ſold any part of this perſonal eſtate; ſhe might have ſpent the whole by contracting debts for valuable conſideration, to the value of the whole; for not only by the operation of law, but of this deed, whatever debts ſhe contracted were to be paid out of her perſonal eſtate; and it is abſurd to ſuppoſe ſhe would paſs her wearing apparel to the truſtees during her life out of her diſpoſal. (237)

(e) But though this is not a veſted intereſt, that will not determine the queſtion; for a contingent intereſt may paſs to the repreſentative, as well as a veſted intereſt; for which there are ſeveral determinations under deeds, but frequently

Contingent intereſt will go to the repreſentative.

(e) Ante, 47. 3 Ven. 112

ly under wills. As a contingent legacy, though he dies before the contingency happens, will go to his executor or adminiſtrator, though not mentioned; ſo under a truſt, a contingent intereſt may go to executor or adminiſtrator though not veſted in the perſon during his life; and in the ſame manner will this contingent intereſt go to the niece.

The words put to exclude the huſband, have not the conſtruction contended for on the part of the plaintiff; for the property is thereby notwithſtanding in the *feme covert*, to whom it is ſo limited Nor is it abſolutely confined to that method of appointment; for ſuppoſe both the niece and her huſband had ſurvived Mrs. *Bouchier*, and the niece died without appointment, notwithſtanding thoſe ſtrict words, it would go to her repreſentative, although it was the huſband: yet that would not be according to the words of the deed, becauſe ſhe made no appointment; for theſe words have a greater effect than merely to exclude the huſband; for they carry the property with it, which will go to her repreſentative; for ſhe had the giving her property by this deed as much in view, as the perſonal benefit of the niece and excluſion of the huſband.

Then between two volunteers, one claiming under this deed, another under the will, I cannot ſay this deed, made in her life ſhould give way to her will; which can only be by ſaying this deed is a will. And that is directly contrary to her intent; which was to prevent her being impoſed on in making a will; and this is dreſſed up to defeat the deed only,

Diſmiſs the bill without coſts.

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Roberts *verſus* Kingſly, *May* 5, 1749.

Articles and ſettlement in purſuance and in the very words, thereof both before marriage,

(f) BY articles before marriage an eſtate is agreed to be ſettled on the huſband for life, *ſans waſte*; remainder to the heirs-male of his body; with power to raiſe portions for younger children. A ſettlement is afterward made alſo before marriage, in purſuance of the articles, and obſerving the very words of the articles. The huſband levies a fine, declaring the uſes to himſelf in fee: and by his

(f) 1 Wms. 123. Bro. Parl. Cas. 327. 2 Vern. 658. 2 Eq. Ab. Pl. t. 2 Vol. 358.

his will makes a proviſion to truſtees for payment of his ſon's debt; for which purpoſe they were to make propoſals to his creditors. The truſtees file a bill, to which the ſon was made party, againſt the ſon's creditors, to elect whether they would accept the propoſals or not; in conſequence of which a decree is made.

under which huſband would be tenant in tail, will be rectified in this court for the ſon; but he having a benefit under his father's will by payment of his debts, muſt make his election.

The ſon brought this bill to have the ſettlement rectified, according to the intention of the articles; which was to make his father tenant for life only, although the words both of the articles and ſettlement in conſtruction of law made him tenant in tail: for if ſuch was the intent, it was needleſs to give him the power to raiſe portions: before marriage, indeed the parties might come to a new agreement; but the ſettlement itſelf, being in purſuance of the articles, excludes any ſuch notion. This was done by the *Lords in Weſt* verſus *Eriſey*, 2 *Wms.* 349, although the party there claiming it ſtood in a weaker light than the preſent plaintiff; nor is the father's will any obſtacle to this, for though the general rule is not to be diſputed, that one, who takes any thing real or perſonal under a will, ſhall be precluded from litigating any part of the will, as having conveyed away an eſtate, in which he was intitled to a limitation: yet nothing was here given to the ſon by the will. It was not in his power to prevent the propoſals from being complied with; and though his debts would be thereby diſcharged, that is not ſuch a benefit, as is within the rule, which will not be carried farther. Beſide at the time of making him a party, he was not conuſant of his right, not having then diſcovered the articles; ſo that he ſhall not be eſtopped thereby, ſuppoſing it was a direct deviſe to him.

This fact of the time of the diſcovery of the articles, not being ſufficiently made out, Lord *Chancellor* put it into a method of inquiry. And upon its coming back, it appearing that they were not diſcovered to the ſon till after the making that decree; he now delivered his opinion.

LORD CHANCELLOR. (239)

The general run of the caſes, where theſe ſettlements are rectified, has been, where the articles only were before marriage, the ſettlement afterward: and though a diſtinction has been ſometimes made, where both were before marriage, yet there have been caſes of it. *Weſt* v. *Eriſey* was ſtronger againſt the determination than this caſe;

caſe; which is clear of moſt of the objections there. The cauſe of the doubt in that caſe, and of the admiſſion of the bill in the court of *Exchequer* was, that it was not in favour of the heir;* the limitation there being to the heirs-female of the body, and therefore not ſufficient ground to ſay that heirs-female of the marriage was deſcriptive of the daughters of the marriage, ſo as to make them purchaſers. But the *Lords* were of opinion, that, although the ſettlement was made before marriage, it ought to be reduced to a ſtrict ſettlement on the daughters in tail; which prevailed againſt the fine and diſpoſition of their father's will. But this is deveſted of theſe circumſtances, being the common caſe; the variation from the intent of the articles and from the ordinary courſe of ſettlements, not ariſing from any new agreement (g) (being made in purſuance of the articles) or fraud, but from miſtake, in not attending to a ſtrict ſettlement. The reaſon of which is unanſwerable, *viz.* that on a ſettlement for valuable conſideration to make the father tenant in tail would be nugatory, and the ſame as making him tenant in fee.

But the ſon having ſubmitted to and taken a benefit under his father's will, muſt be bound thereby; for what was applied for the payment of his debts, was for his benefit, and the ſame as if paid to himſelf: therefore though he is intitled to relief, and to have the ſettlement rectified according to the true intent of the articles, he muſt be now conſidered in the ſame light, as if he had then diſcovered them, and cannot retain both, but muſt make his election.

Caſe 125. Weſt *verſus* Skip, *May* 1749.

(h) A Partnerſhip was entered into in a brewery between *Skip*, and *Ralph* and *James Harwood*, and particular terms then agreed on between them, that *Skip* ſhould have ſuch a proportion of the out ſtanding debts, and a lien and ſecurity on the partnerſhip ſtock, to make that ſhare of thoſe debts good to him according to the value ſet on them, with penalty in caſe of a breach.

After

* In 2 Wms. 536, a remainder in marriage articles to the heirs of the body of the huſband by his firſt wife, was held not to extend to daughters, but in 3 Atk. 271, *iſſue* was held to extend to female as well as male. Vide 2 Wms. 356. 4 Ed. Note 1.

(g) If the ſettlement is not ſaid *to be in purſuance of the articles*, it will not be rectified, though both articles and ſettlement were made before marriage. Talb. 20.

(h) Peſt. 456.

After this ſome differences aroſe between them on a ſuggeſtion, that *Ralph Harwood* drew more, than he ought, out of the ſtock, and received debts without the privity of *Skip*, with ſeveral other breaches of covenant and miſbehaviour; which produced an action by *Skip* for the penalty of the articles; in which a judgment was recovered. But before execution thereon *Ralph Harwood* confeſſed a judgment to his ſiſters; who took out execution by *Elegit*, and laid hold of the partnerſhip ſtock, which was aſſigned by the ſheriff. (240)

Skip, inſiſting that this was a fraudulent act to cover the effects, took out a commiſſion of bankruptcy againſt *Ralph Harwood:* upon whoſe application to ſuperſede it, iſſues were directed to try whether he was a bankrupt or not at the time of the commiſſion. But inſtead of trying it, the partners came into a rule by conſent by order of *Niſi prius*, which was afterward made a rule of *C. B.* and which order was, that *Ralph Harwood* ſhould execute a bond with penalty to *Skip*, and procure two other bonds with penalty conditioned to pay to *Skip*, what ſhould be due to him on the day of the date of the order, with the intereſt; and ordered with like conſent, that the partnerſhip ſhould ceaſe as on that day, and the account of the partnerſhip trade ſhould be carried on to that day, and no farther: and that upon *Ralph Harwood*'s giving ſuch ſecurity as before mentioned, the commiſſion ſhould be ſuperſeded, the officers diſcharged, and the effects delivered.

Under this order nothing effectual was done; the whole thereof depending upon *Ralph Harwood*'s giving the ſecurity therein mentioned; which he not performing, motions were made in *C. B.* for attachments againſt him for contempt in breaking this rule; which, being found to be only a perſonal remedy with no effect, produced an application to *Chancery* under the commiſſion of bankruptcy: and by conſent of the parties it was ordered, that the rule of *C. B.* ſhould be diſcharged, except ſo much as related to the diſſolution of the partnerſhip; and ordered to reſtrain *Harwood* from diſpoſing of any of the effects except in the way of trade; and that it ſhould be tried again. On the trial a verdict was found, that at the time of iſſuing the commiſſion *Harwood* was no bankrupt: and ordered, that the commiſſion ſhould be ſuperſeded.

Skip

Skip filed a new bill in this court, ſetting forth all this; praying an account and ſatisfaction for the breaches of covenant, and to be paid what was due to him out of the goods and effects taken in execution; and that the defendant might be reſtrained from getting in the partnerſhip effects to his prejudice.

The cauſe was put off ſeveral times, that *Harwood* might find ſecurity, to prevent the appointing a receiver. But upon his not doing it a decree was made, and a receiver appointed. It appeared afterward, that *Harwood* had endeavourd to ſecrete the effects in a very extraordinary manner during the hearing of the cauſe, after the propoſitions made to him, and time given him to comply therewith; getting in the debts, and giving receipts where nothing was paid; which produced a commiſſion of bankruptcy by other creditors eight days after making the decree: and theſe acts of *Harwood*, done really to elude the decree and appointment of the receiver, were now ſet up as acts of bankruptcy.

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This occaſioned new conteſts, and a new bill by the aſſignees, inſiſting that *Skip* has no property either legal or equitable againſt them: but that his debt ought to be levelled with all the other debts of *Harwood*; and he be conſidered barely as a creditor.

And *Skip* brought a bill to have the partnerſhip eſtate firſt diſpoſed of for his ſatisfaction: and that nothing ſhould be conſidered as belonging to the *Harwoods* till after that deduction: and to carry on the former decree.

LORD CHANCELLOR.

The main, if not the only queſtion is, firſt, whether *Skip* has any intereſt in, or ſpecific lien upon this ſtock? Another and very different queſtion, (though it has not been treated as different at the bar) is, whether the ſiſters, defendants to both bills, are to be conſidered, as between them and the aſſignees, as having any intereſt in, or ſpecific lien upon this ſtock; the firſt decree having conſidered them, from the time of the *elegit*, as partners?

The firſt muſt be conſidered in two lights; firſt, whether *Skip*, as between him and the *Harwoods*, is to be conſidered as having any ſpecific intereſt at the time of the commiſſion. Secondly, ſuppoſing he had, whether any thing

thing happened to vary that right, as between him and the aſſignees; particularly whether this ſpecific lien is gone by the 21 *J.* 1. *c.* 19, and theſe goods to be conſidered as the effects of the bankrupt, to be diſtributed among all the creditors.

As to the firſt, it is inſiſted, that from the diſſolution of the partnerſhip by the order of *niſi prius*, *Skip* had parted from or varied his ſpecific lien in the goods; and had reſorted by conſent to take perſonal ſecurity for his demand: and that however that be as to the old ſtock, yet as to the new, he certainly can have no ſpecific property, intereſt, or lien thereupon. It is neceſſary to conſider what kind of lien *Skip* had originally, as between him and the other partners: then how it was after the diſſolution: then how it would have ſtood, if the queſtion had ariſen between the repreſentative of a partner and a ſurviving partner; as that will go a great way to determine the other. (242)

* The partners themſelves are clearly jointenants in the ſtock and all effects: not only that particular ſtock in being at the time of entering into the partnerſhip; but to continue ſo throughout; whatever changes might be made in the courſe of trade. Otherwiſe it is impoſſible to carry it on. † And being ſeiſed *per my & per tout*, when an account is to be taken, each is intitled to be allowed againſt the other every thing he has advanced or brought in as a partnerſhip tranſaction, and to charge the other in the account with what that other has not brought in, or has taken out more than he ought: and nothing is to be conſidered as his ſhare, but his proportion of the reſidue on (i) balance of the account. ‡ That this is ſo at law, appears from two caſes, 2 *Lord Raym.* 871. and *Heydon* v. *Heydon*, *Sal.* 392, where it was held, that judgment and execution againſt one partner for his ſeparate debt does not put the other in a worſe condition; for he muſt have all the allowances

Partners continue jointenants in the ſtock notwithſtanding its changes in the courſe of trade, and are ſeiſed *per my and per tout*, and on account each muſt have all allowances before a judgment creditor of the other can come on the other's

* Theſe principles approved by Lord Mansfield in Cowper 445, and induced him to rule that aſſignees, under a joint commiſſion againſt two parties taken out after bankruptcy of both, cannot have trover againſt one in poſſeſſion of goods under a ſale or conſignment, Bona Fide for valuable conſideration and without fraud, from one of the partners who was not a bankrupt, but the other had committed an act of bankruptcy.

† Where partnerſhips have commenced at different times upon a bankruptcy of all, the court will direct ſeparate accounts, and that each eſtate ſhall firſt bear its own debts. 2 Brown, 15.

(i) Cowper, 471. 3 Wms. 183.

‡ 2 Vern, 293.

ſhare; And ſurviving partner is conſidered as a truſtee for repreſentative of the deceaſed, who has a ſpecific lien, but ſuch lien may be loſt by lacheſs or conſent to leave the goods, in the power of the other, who afterward becomes bankrupt; which may bring it within 21 *J.* 1. 19.

lowances made him before the judgment creditor can have the ſhare of the other applied to him. (k) So if one partner had died, the debts and effects ſurvived: but yet the ſurvivor is conſidered in this court barely as a truſtee for the repreſentatives of the deceaſed; upon which footing the account would be taken, and nothing conſidered as the ſhare of the ſurvivor till afterward: which is from the continuance of the property in the ſtock to the repreſentative of the deceaſed partner, who has a ſpecific lien thereon, although the ſurvivor afterward dies or becomes bankrupt. So if the partnerſhip was diſſolved by conſent; as in this caſe, that determines not the legal intereſt, which continues as before; ſo that the property in the ſtock of the partner ſo going out is not deveſted thereby, but he remains equally intitled as jointenant with the other; and in a bill for an account the ſtock would be ſubjected for his ſatisfaction. Then, as between one partner and the ſeparate creditors of the other, the law and thoſe two caſes before mentioned ſay, that they cannot affect the ſtock any farther, than that partner could, whoſe creditors they are. It is objected, that all this is allowed by the rule, by which *Skip* conſented to determine the partnerſhip, and that perſonal ſecurity ſhould be given; which is a waving his property, and reſorting to perſonal ſecurity: but that is a moſt ſtrained conſtruction, and there is nothing in the rule to import it. The price to be paid for *Skip*'s ſhare remained to be ſettled, and the bond for payment was never executed; *Harwood* having trifled and performed no part. It is impoſſible therefore to conſider *Skip* as parting with his lien upon this ſtock by this rule, when nothing was done toward carrying it into execution. But the ſubſequent proceedings ſhew, that *Skip* inſiſted on it, *viz.* his bill, and the order was made to reſtrain *Harwood* from diſpoſing of his effects; for which order there would be no ground, had *Skip* been conſidered only as a ſeparate creditor, and not as having a ſpecific lien.

(243)

But the more material conſideration is, whether any, and what alteration is made by theſe acts of bankruptcy, and the commiſſion thereon; which ſhall now be taken for granted to have well iſſued, and to have been acts of bankruptcy, without entering into that queſtion.

And

(k) Cooke's Bank Law, 298.

And to ſhew that in point of law and equity ſuch an alteration has been, and thereby *Skip* has loſt his ſpecific lien, the clauſe in 21 *J.* 1. 19. is inſiſted on: the conſtruction of which clauſe has been much controverted and argued in the caſe of *Ryal* v. *Rowles*; which caſe yet waits for the opinion of the judges; and therefore I at firſt doubted, whether it ſhould not wholly ſtand over, till that reſolution is given. But on conſideration I think I can form an opinion (at leaſt to ſatisfy myſelf) without prejudice to any queſtion, that may ariſe in that caſe; of which this will ſtand clear.

Poſt 348. 27 Jan. 1749-50. 1 Atk. 165. S. C.

Firſt obſerve, that this is not a caſe ſtrictly within the words of the preamble of that clauſe; which is a deſcription only of goods and effects of the bankrupt himſelf, conſigned by him to another, who ſuffers them to be left in the poſſeſſion of the bankrupt. And in *L'Apoſtre* v. *Le Plaiſtrier*, cited in 1 *Wms.* 318, it was held by *Holt C. J.* that the enacting clauſe ſhould be explained by the preamble: but my opinion ſhall not be founded on that. This caſe clearly, according to *Holt*'s opinion, would not be within this clauſe; for *Skip*'s ſhare was his own; not being aſſigned by him to *Harwood*; nor within the preamble. But I will not determine a point, in which ſuch great judges differed; as Lord *Cowper* did, with ſome warmth from *Holt*, in the caſe of *Copeman* v. *Gallant*, 1 *Wms.* 314. nor is it neceſſary.

But what I found myſelf upon, is, that by the enacting clauſe to ſubject goods to the creditors of another perſon, thoſe goods at the time of bankruptcy ſhould be left in the poſſeſſion, order or diſpoſition of the bankrupt; ſo that he might take upon himſelf to ſell or diſpoſe as owner: and there has been no caſe upon this act, or ever will be, wherein a court of law or equity will do ſo ſevere a thing as to ſubject the property of one to the debts of another, (l) without proof of the conſent of the real owner to leave them in the power of the bankrupt (poſſeſſion only not being ſufficient) or a lacheſs in letting them remain there, ſo as to gain him a falſe credit. The contrary of which appears here; for it is impoſſible to take more methods to prevent it, than *Skip* did; the evidence being that there is no ſuch implied conſent, eſpecially as there was no execution by *Harwood*.

(l) It depends on the nature of the contract, 1 Atk. 185. Dougl. 303.

Whether the property of goods is affected by a *lis pendens*, Q.

Nor do I found myſelf on the notion of a *lis pendens*; which, it is inſiſted for *Skip*, ſubſiſted at the time of the bankruptcy by the bringing his bill, ſo as to be ſufficient notice; which queſtion I would not willingly determine, becauſe there is no caſe, where this court has determined the property of goods to be affected by reaſon of a *lis pendens*, where poſſeſſion is the principal evidence of ownerſhip, as of perſonal chattels, which might be of dangerous conſequence: though as to real eſtate it may be otherwiſe.

Caſes not within the *ſt.* 21 *J.* 19.

But what I go upon is, that this caſe is not within the act of parliament: therefore if the queſtion aroſe on the caſe of the mortgage of goods, or an abſolute ſale, and the vendor did not deliver them at the time appointed, but on *trover* againſt him kept the vendee at arms length, and in the mean time became bankrupt; this would not be conſidered as a leaving the goods by vendee in the poſſeſſion of the bankrupt within the act; the vendee having done every thing in his power to get poſſeſſion from him. So if a mortgage (which is the caſe of *Ryal* v. *Rowles*) of goods, which are contracted for, and agreed to be delivered into the party's own hands, or the key of the warehouſe (which in bulky goods is all that can be done) but no ſuch delivery is made; and a bankruptcy follows; *detinue* having been brought for them, they would not be conſidered as left in the poſſeſſion of the bankrupt: the purſuit in a court of juſtice excluding any actual or preſumed conſent. Farther ſtill: ſuppoſe a partnerſhip determined by effluxion of time; one intends to continue the trade, the other will not, inſiſting upon a diviſion; and on non-compliance brings an action at law, or a bill in equity for an account, and to reſtrain the diſpoſing of thoſe goods, the poſſeſſion of which is wrongfully kept from him by his partner; who pending this becomes bankrupt: this would not be within the ſtatute.

A partnerſhip lien is not appropriated to the original ſtock, but alſo to the produce.

Skip therefore is intitled to the ſame ſpecific lien againſt the aſſignees as againſt *Harwood:* and that even as to the new ſtock; for in all thoſe caſes of a lien on a partnerſhip it is not conſidered as appropriated to the ſtock brought in, but to every thing coming in lieu during the continuance or after the determination of the partnerſhip. As in *Bucknal* v. *Roiſton*, *Pre. Chan.* 285. Where a lien was held to be on thoſe goods, which were the produce of the original goods. So in *Brown* v. *Heathcote*, *Mich. T.* 1746, I held, that it continued, on what was the produce by way of barter and ſale: and that holds much more ſtrongly in the caſe

caſe of a partnerſhip trade which cannot otherwiſe be continued. It is ſaid, that the acts of parliament relating to bankrupts intended to level theſe ſpecific liens, as they do judgments unexecuted: but that is becauſe of the expreſs words of the act of parliament, that judgments unexecuted ſhould be levelled; for otherwiſe they would continue ſpecific liens. (245)

Another queſtion is between the aſſignees and the ſiſters; in which ariſes a difficulty in reſpect of the penning of the former decree; which could not then be foreſeen; as then no bankruptcy had taken place, and the *Harwoods* themſelves were partners.

The ſiſters inſiſt on two ſpecific liens; firſt by the inquiſition taken by the *elegit*; ſecondly by aſſignment of the officers of exciſe when the effects were ſeiſed. Upon which a very different queſtion ariſes, as between the aſſignees and the ſiſters, from what it was between *Skip* and the ſiſters; for as againſt *Skip* the ſiſters could only affect the ſhare of *Harwood*, on the authority of *Heydon* v. *Heydon*, and 2 Lord *Raym.* 871. it was immaterial to *Skip* to enter into the queſtion, whether they are general creditors or not: but as the aſſignees can only affect a ſhare of that ſhare, it may be very material to them, whether the ſiſters have gained a preference by thoſe two liens. And that may be influenced by the opinion of the judges in *Ryal* v. *Rowles*: for the ſiſters on the *elegit* do not take poſſeſſion of the goods, but leave them abſolutely with the *Harwoods*. The queſtion therefore ariſes, whether by this clauſe they are not excluded, being either a plain conſent or great lacheſs: and it holds more ſtrongly againſt a creditor by execution than any other; for if a creditor by *fieri facias* ſeiſes the goods of the debtor, and ſuffers them to remain long in the debtor's hands, and another creditor obtains a ſubſequent judgment and execution: it has been determined often, that it is evidence of fraud in the firſt creditor, and the goods in the hands of the debtor remain liable. As to them therefore the point ſhall remain till the determination of that queſtion.

The bill therefore muſt be diſmiſſed, ſo far as it ſeeks to come upon the ſpecific lien of *Skip*; but in juſtice to the aſſignees, the other queſtion muſt be reſerved: and if by the determination of *Ryal* v. *Rowles* I ſhould think, the ſiſter have loſt their ſpecific lien, I may come at it by varying the former decree; conſidering them, inſtead of partPoſt. May 16, 1750.

ners, as gaining a lien, but as having loſt it by lacheſs, and to receive a dividend as general creditors of the *Harwoods*.

On a bill to carry into execution a former decree, the court may conſider the directions and whether any miſtake.

The only difficulty objected is, that on a bill to carry a former decree into execution, the court can only do that, and not vary; and the general rule is ſo. But there are ſeveral inſtances wherein the court has conſidered the directions, and whether there was any miſtake: as has been done by Lord *Cowper*, to attain the juſtice of the caſe; and may be done here, eſpecially as between new parties.

(246)

Caſe 126. East India Company *verſus* Campbel, *June* 7, 1749. *Exchequer.*

INFORMATION was brought in the name of the *Attorney General*, that defendant might diſcover how he came by the poſſeſſion of certain goods? whether it was not by fraud, violence, contrivance, or other means: and whether they were not the property of the *Indians*, from whom they were ſo taken by the defendant and others? The defendant's ſhare amounting to a conſiderable ſum; the captain of one of the company's ſhips, on board of which he had put it, refuſed to deliver to him; having informed the company of the tranſaction, in which the defendant was ſaid to be concerned.

The defendant put in a plea, which was over-ruled, and afterward demurred, the ſame in ſubſtance as his plea, to the putting in any anſwer; for that he cannot diſcover, how theſe goods came into his poſſeſſion, becauſe it would ſubject him to a fine or corporal puniſhment: or that if he ſhewed, he gained it in the way of trade, he would be liable to the penalties in the acts of parliament eſtabliſhed for the company.

Againſt which it was ſaid, two dilatories will not be ſuffered. The company is conſidered in the *Eaſt Indies* as a ſurety for every *Engliſhman*, and anſwerable for any damage done by them there; and as every ſurety may come upon his principal, has a right to be indemnified by the perſon, from whom the *Indians* ſuffered an injury, for which the company are to make ſatisfaction. As in the caſe of the crown, who muſt make reparation for depredations committed by the ſubject, but may bring an information

mation againſt that ſubject to indemnify his country for the loſs ſuffered. So the rule in all treaties is, that upon *letters of marque*, ſatisfaction only equal to the injury ſhall be taken; if more is taken, the crown may oblige the party to refund. As theſe goods are not the property of any one, the crown ought to interpoſe by its right to take care of the intereſt of the public, and to prevent a failure of juſtice, as it does in other caſes. The not venturing to deny the charges is a tacit admiſſion. A court of equity will not indeed compel a defendant to ſubject himſelf to a penalty, unleſs it is waved: but here he would be ſubject to none, by reaſon of the pardon in the act of grace: but ſuppoſe he had confeſſed it, there could be no puniſhment, as it could not be tried here; nor is it puniſhable by the ſtatute of *H.* 8. as being within the juriſdiction of the *Admiralty*. Bills *quia timet* are allowed here: ſome of the queſtions he may very innocently anſwer, nor will any of them harm him, if he anſwers in the negative, as he may. (247)

But *per tot' cur.* This is an out of the way bill, and of a dangerous nature, by perſons having no right, and founded on ſeveral ſuppoſitions. If any complaint had been made in the *Eaſt Indies*, and depending there, the company might be right to have this money retained, till that was determined: but there being no complaint, it is to be preſumed, none will be. The matter, if committed, is allowed to be felony, and by the *Attorney General* himſelf is thought to be piracy; although not ſo by the courſe of common law. Then the rule is, that this court ſhall not oblige one to diſcover that, which, if he anſwers in the affirmative, will ſubject him to the puniſhment of a crime; for it is not material, that, if he anſwers in the negative it will be no harm; and that he is puniſhable appears from the caſe of *Omichund* v. *Barker*, as a juriſdiction is 1744.
erected in *Calcutta* for criminal facts; where he may be ſent by government and tried, though not puniſhable here: like the caſe of one who was concerned in a rape in *Ireland*, and ſent over there by the government to be tried, although the court of *B. R.* here refuſed to do it: which was founded on a caſe in 2 *Ven.* for the government may ſend perſons to anſwer for a crime wherever committed, that he may not involve his country; and to prevent repriſals. But this objection goes farther; (n) for if it only tended to render

(n) 1 Vern. 109. 2 Vol. 245. 1 Atk. 539, 450. 2 Atk. 393, 200. 1 Brown, 97. 3 Wms. 376.

render him infamous, he ſhould not be obliged to anſwer: but he is alſo liable to be affected civilly, *viz.* by a proſecution by the company for carrying on an illicit trade within the limits of their juriſdiction; and this, whether he went in the company's ſervice, or not; for though lawfully there, he might not lawfully trade there. Nor is this within the notion of two (o) dilatories; for though a demurrer is a dilatory, a plea is not; being matter of juſtice in bar to the relief ſought: * and a plea may be overruled, as a plea of purchaſe without notice for want of form, covering too much, *&c.* and yet it may be inſiſted on in the anſwer. But ſuppoſing it dilatory, a court of equity muſt not merely for form's ſake be a court of inquiſition to do great injuſtice. An exception may be allowed as to part, and over-ruled as to part: but all is here relative to one thing, *viz.* the method of coming by this, ſtated to be taken by force, violence and fraud; which, whether the defendant is obliged to anſwer, is the queſtion now; and is aſked by perſons, who have not made out their right; for unleſs this is proved to be ſtolen, the crown has no more a right thereto than a private perſon. Poſſeſſion *primâ facie* gives property; which is in defendant, and (by *Chief Baron Parker*) the property is not in the *King*, but in the proprietors; who are intitled to reſtitution: but whether the crown is concerned or not, may be conſidered at the hearing. If defendant is not obliged to anſwer the facts, he need not anſwer the circumſtances, although they have not ſuch an immediate tendency to criminate: nor ſhould the privileges of great companies be extended farther, that the trade neceſſarily requires, to the oppreſſion of others.

Demurrer is dilatory; a plea not.

(248)

Caſe 127. Metcalf *verſus* Hervey, *June* 9, 1749.

Bill of interpleader.

Affidavit to bill of *Interpleader* need not ſwear that it is at plaintiff's own expence.

DEMURRER to a bill, which was founded on a rumour, that there was iſſue by Lady *Hanmer*; which iſſue was ſuggeſted to be intitled to the eſtate in queſtion; and praying that if there was any ſuch perſon, he might interplead with the defendant, and alſo praying an injunction to ſtay proceedings in ejectment by defendant, and to any action for meſne profits.

Two

(o) 2 Vol. 492.

* Double plea ordered to ſtand for an anſwer with liberty to except. 1 Brown, 404.

Two cauſes for demurrer were aſſigned. Firſt for the inſufficiency of the affidavit annexed to this bill of interpleader, in not ſaying it was at the plaintiff's own expence, as well as that there was no colluſion with the defendant. The ſecond, that no caſe was ſtated to intitle to any relief ſo as to oblige the defendant to put in an anſwer: that in a bill of interpleader it muſt be ſhewn, that the plaintiffs are in danger of paying rent a ſecond time; and that ſuch bill on demurrer will be taken ſtrongeſt againſt the party whoſe bill it is.

For plaintiffs. This is not a mere bill of interpleader; it praying ſomething further. There is another perſon to interplead with, although the plaintiffs cannot find him out: like the caſe of another defendant's being beyond ſea. Where it is doubtful whether a perſon is dead or not, the court has compelled ſecurity to be given, if he appear not to be dead. The court has preſcribed no particular form of affidavit, but in general that there is no colluſion.

LORD CHANCELLOR.

This is a very particular caſe: (p) but as it is a general demurrer to the whole bill, if there is any part, either as to the relief or diſcovery to which the defendant ought to put in an anſwer, the demurrer being entire, ought to be over-ruled.

Demurrer to the whole bill as to diſcovery and relief; if plaintiff intitled to diſcovery the demurrer muſt be over ruled.

As to the firſt cauſe of demurrer, there is no ſuch rule of court; the material part of the affidavit being that the plaintiffs ſhould ſwear they did not collude with any of the defendants: whereas the requiring to ſwear, it is at their own expence, goes farther: and ſuch an affidavit would require the denying it even in caſes where a perſon may bear the coſts of ſuit without being a maintainer: as a father furniſhing the expences of a ſuit on a bill by his ſon.

As to the ſecond cauſe: the bill is in two lights. Firſt, ſuppoſing it any interpleading bill; ſecondly, ſuppoſing it not; whether there is any other ground?

As to its being an interpleading bill, it is of the firſt impreſſion: not averring that there is any ſuch perſon as can interplead with the defendant: nor ſhould I be willing to

(p) If it does not go to the whole bill, the particular profits demurred to muſt be clearly expreſſed. 2 Vol. 451.

to allow new inventions in bringing bills of interpleader; which might be dangerous; as they are formed in ſome meaſure as interpleader at law; in which it muſt be ſhewn to be between perſons *in rerum natura*. One thing indeed occurs, *viz.* ſuppoſe a guardian, having the infant in his cuſtody conceals, and will not produce him, but ſets up a title to himſelf; and the infant is the perſon ſuggeſted to have right to controvert that title; in ſuch a caſe, and ſo charged, I will not ſay, but ſuch a bill might be brought, and to compel the guardian to produce him.

Bill lies to diſcover the title of a perſon bringing ejectment, and to ſee if it is not in ſome other.

But whether that be the preſent caſe or not, the ground I go on is the other part; not only praying to interplead but for an injunction; which cannot be founded on a bill of interpleader as to the ejectment: as ſuch bill cannot be as to the poſſeſſion, but muſt be as to the payment of ſome demand of money. The queſtion comes to this: whether any perſon in poſſeſſion of an eſtate, as tenant or otherwiſe, may not bring a bill to diſcover the title of a perſon bringing an ejectment againſt him, to have it ſet out, and ſeen, whether that title be not in ſome other. I am of opinion, he may, to enable him to make a defence in ejectment, even conſidering him as a wrong doer againſt every body. As to the prayer for an injunction to an action to meſne profits, it appears from the caſe, that if there be ſuch a child *in rerum natura*, he muſt be an infant, and then the plaintiffs are in a different light, than if he was of full age. None can have an action for meſne profits, unleſs in caſe of actual entry or poſſeſſion; for which no pretence exiſts here; and every perſon poſſeſſing the eſtate of an infant after his title accrued, is conſidered here as guardian to him.

Then even ſuppoſing the interpleading part of the bill, which I am not willing to allow, to be out of the caſe, and conſidering it as a bill, for the diſcovery of the defendant's title to poſſeſſion of the eſtate, and to the rents and profits: (q) the plaintiffs are intitled to that diſcovery: and the defendant having demurred to the whole bill for diſcovery as well as relief, it ought to be over-ruled.

Owen

(q) Unleſs it has been tried and determined before. 1 Brown, 305.

Owen *verſus* Griffith, *June* 10, 1749. Caſe 128.

APPEAL from a decree made by *Juſtice Abney*, ſitting for the *Maſter of the Rolls*, for not giving coſts to the defendant upon a bill brought to have an account taken, and for relief and ſatisfaction in the nature of a redemption of an eſtate, which the defendant had extended by *elegit* upon a judgment on a debt originally created by bond.

The rule that no appeal for coſts merely, not to be ſtrictly adhered to, if a ſound diſtinction can be made: as where a fair incumbrancer is decreed only his principal and intereſt.

The general rule, that there could not be an appeal for coſts only, was inſiſted on: the coſts were diſcretionary in the court, and not of right to be given to mortgagee, who may even be made to pay coſts, if he miſbehaves; as by inſiſting on an eſtate not to be redeemable, which appears to be redeemable.

LORD CHANCELLOR.

Creditor to account for profits really received; and not only according to the extended value. But this court goes farther.

The defendant could only be obliged to account according to the extended value. But this court ſince Lord *Cowper*'s time goes farther, and obliges the creditor to account for the profits really received: he is clearly intitled to his coſts on the merits, if not precluded by that rule; which I have often heard ſo delivered by the court. (r) The foundation of it was to prevent vexation and trouble; for as caſes in equity often depend on abundance of circumſtances, about which as the reaſon of mankind might differ, it would create perpetual appeals: but this is no printed rule; and it ſeems ſomewhat ſtrict and hard to adhere to it; for ſince the ſtamp duties coſts come to be very material. Yet if it was to be laid open generally, that an appeal might be for coſts, it would cauſe that general inconvenience, to which a particular inconvenience ought to give way. But if a ſound diſtinction from the rule can be made, it ought to be allowed: and it will be very unfortunate, if in this caſe the defendant ſhould be precluded thereby; for being an incumbrancer for a juſt debt, and having a lien on the eſtate for his coſts as well as his demand; it ſeems to be an exception, and different from the court's not ſuffering matters to be over-ruled merely for coſts. Beſides here the appeal for coſts affected the merits of

(r) This doctrine affirmed by Lord Thurlow in 1 Brown 143, where he held there ſhould be no appeal or rehearing for coſts only, unleſs upon an apparent miſtake.

of the caſe, the juſtice of which is on the defendant's ſide; not being over-paid, or having made a bad defence; in which caſe he might he might be even made to pay coſts. Nor was he in any default in not delivering poſſeſſion, even after he was quite paid; for till his coſts were paid, as well as principal and intereſt, an incumbrancer is not bound to deliver poſſeſſion; the eſtate being as much a ſecurity for one as the other.

(251) Let the defendant therefore have his coſts taxed.

Caſe 129. Robinſon *verſus* Gee, *June* 10, 1749.

A tenant in tail remainder to *B.* in tail, join in mortgage and bond to raiſe money. After death of *A.* his creditors cannot come upon *B.*'s remainder in caſe of *A.*'s perſonal eſtate. And it ſeems that parol evidence could not be read of an agreement to that purpoſe.

SAMUEL GEE, tenant in tail, remainder over to his brother *Oſgood Gee* in tail, (s) with other remainders, wanting to raiſe money for the payment of debts on his eſtate, propoſed to *Oſgood* to join in a mortgage for 1000*l.* which was done; and both joined in a bond: but *Samuel* being firſt named he received the money.

The remainder being veſted and attached in poſſeſſion in *Oſgood* upon the death of *Samuel*, the creditors of *Samuel* brought this bill to turn the mortgage debt and intereſt on the real eſtate of *Oſgood*, and to exonerate the perſonal eſtate of *Samuel*; which it was argued for the plaintiffs was the true intent and reſult of the tranſaction between *Samuel* and his brother in in all events: and that *Oſgood* joined in this manner to preſerve his remainder in tail, which *Samuel* would otherwiſe have deſtroyed by recovery; comparing it to the caſe of an elder ſon preventing his father from ſuffering a recovery by promiſing to make good the proviſions, he thereby intended for younger children. But farther, that there was evidence of a particular agreement for this purpoſe between the brothers, that this debt ſhould be entirely on the eſtate of *Oſgood*.

This was objected to, as not being proper evidence within the ſtatute of *frauds*, becauſe only *Parol:* whereas this being a real right annexed to a real eſtate, ſuch an agreement could not be proved without writing.

Againſt

(s) 1 Wms. 291. 2 Salk. 449. 1 Vern. 36. 3 Wms. 359. 2 Atk. 436. Ante, 52. Poſt, 312.

Againſt this was cited for plaintiffs *Walker* v. *Walker*, December 1740, where *John Walker* having two brothers, ſurrendered a copyhold eſtate to one, charged with an annuity to the other. A queſtion ariſing concerning the right of the parties upon the refuſal of payment of the annuity, by the ſurrenderee: it was contended, that notwithſtanding the ſurrender imported on the face of it to be a ſurrender of the legal eſtate ſubject to the payment of the annuity, yet was it in the view of the parties, that the annuitant ſhould ſurrender a copyhold eſtate, which he was poſſeſſed of, for the former ſurrenderee's ſon; the only evidence of which was by parol: and that his *Lordſhip* held it proper.

(252)

LORD CHANCELLOR.

The queſtion depends on two conſiderations; firſt, on the nature and circumſtances of the tranſaction in general, abſtracted from the evidence of a particular agreement: and as to that, the whole of the propoſal to *Oſgood* was to join in the mortgage, not that he ſhould make his eſtate liable. Suppoſe, this had been the real eſtate of *Samuel* alone of which he was ſeiſed in fee: nothing reſults thereout to exonerate the perſonal eſtate of *Samuel*, and to prevent the deviſee of the real eſtate, or the heir, from having the perſonal in exoneration of their eſtate. The general rule is, that where there is a mortgage of land, with covenant for payment of the money, that is a debt on the perſonal aſſets, to be applied firſt in exoneration. (t) Indeed ſimple contract creditors and legatees will be intitled to come upon the mortgaged premiſſes *pro tanto*, if exhauſted: but executor or reſiduary legatee could not be intitled to ſtand in the place of mortgagee for ſo much as was drawn out of the perſonal eſtate, as pecuniary creditors or legatees might. Suppoſe the heir at law of *Samuel* (which in this caſe was not *Oſgood*, but a child of an elder brother) had joined in the mortgage as ſurety for the perſon borrowing the money, and had no benefit from it, which all went to his anceſtors; he would notwithſtanding his joining be intitled to have a perſonal eſtate to exonerate the real: but this is a mortgage of a divided eſtate. Taking it in general; if it appears that *Oſgood* joined only as ſurety for his brother, and pledged his remainder; that is, turned it into a baſe fee, merely as a ſurety, there is no colour to ſay, the perſonal eſtate of *Samuel* ſhould be exonerated;

(t) 1 Wms. 265.

nerated; for that would be to ſay, the eſtate of the ſurety ſhould exonerate the eſtate of the principal debtor; for which indeed it muſt be a very ſtrong caſe. If that was the caſe, the equity of *Oſgood* would be to have this debt by ſpecialty diſcharged out of the eſtate of *Samuel* againſt every body. Nor could the creditors or legatees of *Samuel* ſay againſt that; ſtanding in the place of their debtor; or have recourſe back againſt his ſurety to have his own eſtate exonerated, which the debtor himſelf could not have. It is a common caſe for a wife to join in a mortgage of her inheritance for a debt of her huſband: after the huſband's death ſhe is intitled to have her real eſtate exonerated out of the perſonal and real aſſets of the huſband; the court conſidering her eſtate only as a ſurety for his debt; and none of his creditors have a right to ſtand in place of the mortgagee to come round on the wife's eſtate. Had there been evidence, that *Samuel* intended to alter the ſucceſſion, and bar his brother, it would have great weight; but there is none ſuch: he wanted to make an effectual mortgage, to induce the mortgagee to lend money, and then was ſatisfied; which diſtinguiſhes it from the caſe of an elder ſon
(253) preventing a recovery by his father; as that is a fraud, and the intent not wholly anſwered, as it is here. But *Oſgood* had no conſideration; nor was *Samuel* deprived of his liberty of ſuffering a recovery; for it was now ſettled (though formerly doubted) that notwithſtanding tenant in tail, has turned his eſtate into a baſe fee, he may by a recovery bar this intail, on the rule of this court as to recoveries in equity, that a perſon having the redemption remains in actual poſſeſſion: ſo that *Oſgood* had no benefit by it. Suppoſe an action brought on the bond or covenant in the mortgage againſt *Samuel* by the mortgagee, and judgment enſued; *Samuel* could not in his life come into this court againſt *Oſgood* to indemnify himſelf againſt this demand; for that would be a ſtrange bill, that he ſhould come againſt his ſurety, who had lent his eſtate: Then if he could not, none in his place could. Suppoſe the mortgagee had brought an action upon the bond againſt *Oſgood* alone, and got judgment; as he might, the bond being joint and ſeveral: *Oſgood* might have brought a bill againſt *Samuel* as principal, and would have relief although no counter bond, and ſtand in the place of the creditor, and is then intitled to that relief after his death.

The ſecond conſideration is, whether there is any particular agreement to turn this debt entirely on the eſtate of *Oſgood?* As to the parol evidence, it is not neceſſary to give

give an abſolute opinion, but I doubt whether it would be good. This is certainly a kind of real right; being to affect a real eſtate in all events, contrary to the writing, and to rebut the equity. Before the caſe of *Brown* v. *Selwin*, it was held in ſeveral caſes, that parol evidence might be given to rebut an equity, although relating to a real right; but in that, which was a caſe of a will, the *Lords* held otherwiſe. From which determination, going further than ever before, I did indeed differ in opinion: the equity there was, that two perſons were made executors and reſiduary legatees; one of them being a debtor inſiſted, his debt was thereby extinguiſhed; the other inſiſting on the contrary, *Selwin* offered parol proof of being made an executor with intent to extinguiſh that debt; which the *Lords* would not ſuffer to be read; and that is a ſtronger caſe than the preſent. As to *Walker* v. *Walker*, the facts are, as have been ctied; but the ground I went upon, was, that it was evidence of fraud againſt the defendant who was to be charged therewith: and no one can protect himſelf by the ſtatute in a fraud: but ſuppoſing it might be read, it is not ſufficient to prove what it is brought for. It is ſtrange, that *Oſgood* ſhould on ſo precarious a chance take this debt entirely on himſelf, when *Samuel* might ſtill ſuffer a recovery: and taking the evidence in its greateſt extent, the weight thereof is taken off and contradicted by the evidence on the other ſide; by which it is plain, that *Samuel* was taken both by himſelf and *Oſgood* to be the debtor. So that the facts ſubſequent and concomitant ſpeak the contrary to any actual agreement to this purpoſe: this is therefore an attempt by perſons ſtanding in the place of the principal, to turn the eſtate of the ſurety to exonerate the debt of the principal.

Caſ. Tal. 240.

(254)

Another queſtion was, whether the plaintiffs were intitled to be relieved againſt an aſſignment and bill of ſale of goods made by *Samuel* in truſt and for the benefit of one Mrs. *Hanks*, by having it ſet aſide: and alſo to have a bond poſtponed given by *Samuel* upon articles, which imported a direct aſſignment by the huſband of his wife Mrs. *Hanks* (who was herſelf a party) to the uſe of *Samuel*, with covenant for quiet enjoyment, and further aſſurance, the conſideration money being 10*l*. *Samuel* having alſo by a clauſe in his will left the ſame ſum, goods, *&c.* to her.

Bond, *&c. exturpi cauſa* ſet aſide as to creditors: but the ſame proviſion being made by the will, *Q.* whether as to executor or reſiduary legatee.

LORD

LORD CHANCELLOR.

As to this queſtion, if it can be called ſo, of the demands of Mrs. *Hanks:* it is an extraordinary caſe, and ſuch as, I hope, never will be again; it is a direct aſſignment of his wife, and is a ſcandalous proſtitution of the law; for the bond looks as if drawn by a lawyer. Although the court in ſome caſes will not ſet aſide ſuch bonds; as in the caſe of young girls, where it is *præmium pudicitiæ*, this is a bond (u) *ex turpi cauſa*, and is infected with the turpitude of the articles; ſo that as to the creditors, it muſt be ſet aſide: as muſt alſo the aſſignment and bill of ſale; which are infected with the infirmity of the conſideration: and had it reſted on the bond, I ſhould not doubt to ſet it aſide in reſpect to the reſiduary legatee. But as the will is to the ſame effect, it is more doubtful: for a legacy may be given, and not be infected with the turpitude of the bond: and then his reſiduary legatee cannot controvert or oppoſe his will. But it is proper to reſerve the conſideration of this till it is ſeen, whether the perſonal eſtate is ſufficient to pay the debts.

It was urged, that a ſpecific legatee, where the teſtator has no power to diſpoſe of it, cannot come againſt reſiduary legatee for a ſatisfaction out of the reſt: and Mrs. *Hanks* is a ſpecific legatee, and cannot come at it becauſe of the turpitude of the contract.

LORD CHANCELLOR.

True; but I will reſerve it as between the executor and her.

* Diſmiſs the bill, ſo far it ſeeks to charge the eſtate, compriſed in the mortgage, come to *Oſgood*, in favour of the aſſets of *Samuel*.

And let the bond, appearing to have been for undue conſideration, be ſet aſide, and alſo the bill of ſale.

Door

(u) 1 Brown 38, 149. 2 Vol. 549. Poſt, 276, 277, 503. Salk. 156. 2 Vern. 392, 588, 652.

* Vide 1 Wms. 4th Edition, 294. Note 1, where all the caſes are collected to ſhew that the perſonal eſtate ſhall be principally applied in diſcharge of teſtator's perſonal debts, unleſs he expreſsly exempts it by words or manifeſt intention, *ſecus*, where the charge is on the real eſtate principally.

Door *verſus* Geary, *June* 12, 1749. Caſe 130.

A Man upon his marriage binds himſelf to leave his wife 500*l.* by his will: he leaves her the intereſt of his perſonal eſtate during her widowhood; and leaves her 700*l.* capital *Eaſt India ſtock*, in which he was then intereſted, poſſeſſed of or intitled unto, to be diſpoſed of by her as ſhe ſhould think fit. He had then no *Eaſt India ſtock*; but there was 700*l.* bank ſtock, to which his wife was intitled in *auter droit* as executrix to another after the debts of her teſtator paid, and which the huſband afterward transferred in his own name.

Huſband deviſes to his wife 700*l. Eaſt India ſtock*, having none; but there was 700*l.* Bank ſtock, to the ſurplus of which the wife was intitled as an executrix after payment of her teſtator's debts; and which the huſband afterward transferred in his own name. The 700*l.* Bank ſtock ſhall go to the wife, being only error in deſcription.

For plaintiffs, repreſentatives of the wife. There was a plain intent to paſs ſtock of ſome kind; no technical words are required in wills to deſcribe the thing or perſon: and the court will conſtrue, tranſpoſe, or leave out words to effectuate deeds or wills. This cannot indeed be taken as a general deviſe of 700*l. Eaſt India ſtock*, ſo as to be made up out of the teſtator's eſtate. But a perſon may take a deviſe though wrongly deſcribed: as in a deviſe to nephew *Dew*, where the name was *New*. This at moſt is but a miſtake in the deſcription of the thing, and within the rule of a miſtake in the perſon, not an error in ſubſtance: of which kind there are ſeveral caſes in *Swin.* of error in the quality of the deviſe, when the ſubſtance is certain: ſo in *Godolph.* 285, *&c.* and *Brownlow* 131, *Pacy* v. *Knolls.* 1 *Jo.* 379, *Cr. C.* 447, 473, and in *Beamont* v. *Fell*, 2 *Wms.* 141, the intent appearing, a miſtake in both chriſtian and ſurname did not make it void: courts have gone great lengths in this. A deviſe of all lands in a place having only tithes there; they paſſed, *Rol. Ab.* and although the quantity of the ſtock now differs from 700*l.* that was the ſum at making the will; nor had he ſtock in any other company.

For defendant, executor and reſiduary legatee The queſtion is, whether the teſtator intended this ſpecific ſum of bank ſtock with ſufficient certainty? For then *error* will not hurt; the court even letting in parol evidence to ſhew the intent. In all the caſes cited the teſtator had the thing given at the time; which the court always conſiders in the deviſe of a ſpecific thing; for if the teſtator had it not, it is void, and the executor ſhall not be obliged to make it good. Here the teſtator had no *Eaſt India ſtock*; nor properly

perly any bank ſtock; being intitled to it in the name of his wife, and his taking a transfer of it in his own name after his will, ſhews he meant it ſhould go as his own eſtate.

(256) LORD CHANCELLOR.

This deviſe is ſufficient to carry the 700*l.* Bank ſtock to the wife under the circumſtances of the caſe. The queſtion is, whether it is abſolutely void, or a bequeſt of ſomething, but erroneous in the deſcription? It amounts only to the latter; in which caſe it is admitted for the defendant, it will not avoid the legacy. In the conſtruction of wills, the teſtator muſt be taken to mean ſomething, if it can: nor muſt the words of a will be void, if they can have effect by reaſonable conſtruction: it is rightly admitted for the plaintiffs, that it cannot be brought within the rule of *Pierce* v. *Snaveling*, which was a deviſe of money, ſo as to make up out of the teſtator's eſtate. Suppoſing the teſtator had this ſtock in his own name, having no other; it would undoubtedly paſs, being only *error demonſtrationis*, and the words *Eaſt India* ſhould be rejected. Why is this a greater miſtake than the deviſe of a black, having only a white horſe; where the word *black* ſhould be rejected? So in *Pacy* v. *Knolls*, and other caſes: I will not mention caſes of miſtake in the names of legatees, where it could be reduced to certainty; although I do not know much difference in error in the deſcription of the perſon of the legatee or of the thing. The preſent teſtator had an intereſt in right of his wife, in this ſurplus of debts of her teſtator; which if he had ſold for valuable conſideration, and died in the life of his wife, it would be good; like the huſband's right over a term of his wife: ſo that though it is true, if the wife ſurvived, ſhe would be intitled to it, yet the huſband had an intereſt in it, which he might convey, and it would bind the wife after his death. This caſe is the ſtronger by reaſon of the obligation he was under by bond to make proviſion for her; having left nothing elſe abſolutely which can be applied to the performance of the condition, except that precarious chance during widowhood, which cannot be ſo applied. The plaintiffs therefore are intitled to have the dividends ariſing from this legacy from the huſband's death.

Poſt.

Whitmel

Whitmel *verſus* Farrel, *June* 22, 1749. Caſe 131.

JOHN HERBERT DODD, at the time of his marriage, having an eſtate of 300*l. per ann.* in poſſeſſion, and a leaſehold eſtate, out of both which he could make a proviſion for a wife; and alſo an eſtate tail after the jointure of his mother determined, ſettles 500*l.* part of her portion in truſt for the wife and iſſue of the marriage, and alſo the leaſehold for the benefit of the wife for life, in bar of dower, not carrying it to the iſſue. He then takes up the conſideration of the additional portion of the wife by her father; and covenants, that within ſix months after the death of his mother, and that he ſhould come to be in poſſeſſion of the eſtate ſo in jointure, he, his heirs and aſſigns, ſhould ſettle ſo much of the eſtate, as amounted to 100*l. per ann.* for every 1000*l.* upon her for life, then to the iſſue of her marriage, and for the want of ſuch iſſue to his heirs.

Huſband covenants in marriage articles, in ſix months after death of his mother, and that he ſhould come to and be in poſſeſſion of the eſtate in jointure, to ſettle, *&c.* He dies in mother's life leaving no iſſue. The eſtate comes to his heir; who ſhall not be compelled by the wife to a ſpecific performance.

He died in his mother's life, leaving no iſſue, and the eſtate came to his ſiſter. (257)

That the plaintiff, notwithſtanding he died in the mother's life, was intitled to compel the heir to make this ſettlement; it was urged, that wherever one agrees to do a thing within a limited time, his heir, who is the ſame as himſelf, is bound to do it, the court conſidering the ſubſtance; not that the party himſelf ſhould do it; and that the words *and that he ſhould come into poſſeſſion*, amount only to a recital, of what went before; ſuch recitals being uſual.

LORD CHANCELLOR.

This is not quite clear of doubt; but on the whole, I am of opinion, that the plaintiff is not intitled to have a ſpecific performance of the articles: it is not the caſe of a wife left without any proviſion made for her under the articles upon the marriage agreement. It is not expreſſed to be by way of jointure; becauſe it would not anſwer the purpoſes of a jointure, as the mother might ſurvive and interpoſe. The intent was for what the wife brought in preſent, to ſecure a certain ſettlement of 500*l.*

and the leaſehould: but as to any additional portion ſhe was to take her chance; it being uncertain on the other ſide, what that addition would be. The material queſtion is of the conſtruction of the articles.

Firſt, to conſider what would be the conſtruction in a court of law; and whether an action of covenant, in the fact that has happened, could be maintained thereon? and I think not; there being two contingencies, (for it is improper to call them conditions) upon which the obligation to perform this covenant was to ariſe; but one of which has happened: for though the mother is dead, he never came into poſſeſſion; and in action of covenant againſt the heir at law or executor, it muſt be alledged, in order to aſſign a breach, that he came into poſſeſſion after the mother's death; which if it cannot be done, the action cannot be maintained.

(258) Then to conſider what conſtruction it will bear in equity: whether a ſpecific performance according to the plaintiff's expoſition? There are few caſes in which a court of equity will decree a performance of a covenant or agreement, upon which there can be no action at law, according to the words of the articles and the events that have happened. This court indeed will carry ſeveral agreements into execution, upon which an action at law cannot be maintained by reaſon of the form of the inſtrument; but rarely where the covenant was not performed by reaſon of the events; in which caſe the ſame conſtruction muſt be here as at law. I will not ſay, that upon a marriage agreement imperfectly drawn by the parties, and not reduced into proper form, a court of equity will not make a liberal conſtruction of the words, to find a proviſion for a wife or children. But here it is regularly drawn: and this court muſt not put a different conſtruction from what the law would do. Nor is the plaintiff's conſtruction the intent.

Diſmiſs the bill therefore, ſo far as it ſeeks a ſpecific performance.

Kirkham

Kirkham *verſus* Smith, *June* 23, 1749. Caſe 132.

(a) *HUGH SMITH* becoming tenant in tail under the will of his father *Eraſmus* upon the death of his two brothers, the laſt of whom had ſuffered a recovery of part of the eſtate and exchanged part, in 1738 pays off 5800*l.* a debt originally upon the eſtate by a mortgage term for years, but does not take care to have an aſſignment of the term to himſelf: and apprehending himſelf to be owner, and to have power to diſpoſe of his eſtate, and having two daughters, in 1741 for natural love and affection to them and his wife, by leaſe and releaſe makes a ſettlement of his whole real eſtate, including and particularly deſcribing this; thereby firſt limiting it to his own daughters and their iſſue, remainder over to the ſame collateral branches as under his father's intail. At the ſame time he makes a will of the ſame date in preſence of the ſame witneſſes, taking notice of his ſettlement and referring to it; and thereby gives legacies to the plaintiffs, directing that his wife ſhould live at his manſion-houſe at *Weald Hall* in *Eſſex* with his daughters, and have the uſe of the furniture, which ſhould be farther enjoyed by the perſons, who ſhould have the manſion-houſe, as limited by the ſettlement.

Tenant in tail pays off an incumbrance by mortgage, but takes no aſſignment; the remainder over ſubject to pay it to his repreſentatives.

He died in 1744, leaving his wife and the two daughters.

The plaintiffs claimed this eſtate under the remainder in the will of *Eraſmus*, as not barred: and claimed it diſcharged of the 5800*l.* incumbrance, as there was a ſtrong preſumption, that it was not paid off out of *Hugh*'s own money, but out of the aſſets of *Eraſmus*; there being a direct repreſentation of executors: ſo that it ſhould not now be a ſubſiſting charge for the benefit of the perſonal repreſentatives of *Hugh*. Nor will the plaintiffs by their claim of this real eſtate be defeated of their legacies of the will of *Hugh*; the caſes, of not diſputing one part of the will when taking by the other, not extending to this. 2 *Wms.* 616, and other caſes on the head of ſatisfaction.

(a) In 1 Brown 218 Lord Thurlow held, on the authority of this caſe and Ameſbury and Brown, Poſt. 477, that tenant in tail paying off an incumbrance is only inference, not juris poſtiri, that he meant to exonerate the eſtate, and evidence may be produced to prove the contrary. The rule of law is where tenant for life pays off an incumbrance, he ſhall be a creditor for the money, but where tenant in tail pays, it is in exoneration of the eſtate, of which he may make himſelf abſolute owner. 1 Brown, 206.

Againſt this it was argued, that the 5800*l.* ſtill ſubſiſted as a charge for the perſonal repreſentatives of *Hugh*; for whom from the time of payment they ſhould be conſidered as truſtees, whether there was an aſſignment or not. Nor does the court in general favour mergers or extinguiſhment, becauſe it might prejudice families. In *Walpole* v. Lord *Conway*, *Auguſt* 1740, Lord *Conway* made a ſettlement of his eſtate, in which 5000*l.* part of his wife's portion was agreed to be laid out in land, and ſettled after his own and his wife's death, for ſuch of the children of the marriage, as they ſhould appoint; in default of appointment to the younger children in tail equally: no direct appointment was ever made: nor was it ever laid out in land; but by his will, he gave his daughters 6000*l.* apiece, ſaying, that, as 5000*l.* part of the wife's portion was not paid, he believed his perſonal eſtate would be more than ſufficient to pay his debts and legacies. Upon a bill by the truſtees, his *Lordſhip* held, that the teſtator conſidering this 5000*l.* as part of his perſonal eſtate, although it was not ſo, nor capable of being diſpoſed of by him for debts and legacies, the daughters ſhould not claim their 6000*l.* under the will, unleſs they gave up their intereſt in the 5000*l.* under the ſettlement: but here is much ſtronger proof of *Hugh*'s conſidering this as his eſtate. In *Cowper* v. *Scot*, *Feb.* 1731, it was held, that a daughter of a freeman of *London* could not claim 1500*l.* charged by the father's will on real eſtate and alſo under the cuſtom; it appearing from the whole context (although by implication only) that the teſtator intended to exclude the cuſtom, though it was not ſaid ſo. In *Ingram* v. *Ingram*, *December* 1740, a father, having power by marriage ſettlement of appointing copyhold eſtate among his children, directs by his will, that it ſhould be divided in ſuch proportion as the wife ſhould think proper, who appoints by will. It was held, that the father could not delegate that power; yet any, who would defeat what the mother had done, by what was in truth no power, ſhould have no benefit under the father's will, which ſhews the extent of the rule.

3 Wms. 119.

LORD CHANCELLOR.

It is miſchievous in general, that ſuch ſort of incumbrances ſhould be ſet up for the benefit of the perſonal eſtate: therefore there muſt be other equitable circumſtances. There being a term for years in the mortgagee, which ſtands in point of law, as it did before, as no aſſignment, none of the parties before the court have the legal

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legal eſtate, for a conveyance of which the plaintiffs come: and that conveyance muſt be upon equitable grounds. So far as it appears, *Hugh* paid it off with his own money; for he might have taken an aſſignment of the term either in truſt to attend the inheritance, which would have ended this queſtion, or in truſt for himſelf, his executors or adminiſtrators; which would, notwithſtanding the remainder over, have kept this incumbrance on foot for the benefit of his perſonal eſtate, and thoſe intitled thereto: or he might in his life have called for an aſſignment of it, if he found out this limitation in remainder, that it might be made for the benefit of his executors, not of the remainder. But his not doing any of theſe, clearly proves, he took himſelf to have the abſolute ownerſhip and diſpoſal of it: and although he has made uſe of ſuch an inſtrument as leaſe and releaſe, (which though it has been thrown out, that it will bar an equitable intail, yet it was never ſo determined, and I hope never will): yet the court cannot decree to perſons claiming this in contradiction to his apprehenſion and intent, not only a conveyance of the inheritance, but alſo of this term without making a ſatisfaction to the perſonal eſtate of *Hugh*: which would be contrary to the maxim, that he, who would have equity, muſt do equity; and theſe are the equitable circumſtances.

As to the other queſtion of the legacies, theſe principles are admitted; that according to *Noys* v. *Mordaunt*, where one taking himſelf to be abſolute owner of an eſtate, when he was not ſo, deviſed it away, and gives an eſtate, whereof he was abſolute owner, to the perſon claiming a remainder in tail in the other eſtate deviſed away; the court will not ſuffer that perſon to have both eſtates by claiming in contradiction to the will in another part. That was in reſpect of real eſtate: ſubſequent caſes have gone farther, and was firſt eſtabliſhed by Lord *Talbot* in the caſe of a perſonal legacy, in *Vincent* v. *Vincent*, which has been ſince followed: as on a deviſe to a younger ſon, of lands intailed, and a legacy to the elder, the elder ſhall not claim the legacy and defeat the deviſee, but ſhall make his election: and this holds, whether the perſons are children or not. This indeed is not the ſame caſe in ſpecie and form, being a middle caſe; but falls within the ſame reaſon. Here the real eſtate is by ſettlement; but this ſettlement and will under the circumſtances of the caſe are to be taken as one entire diſpoſition, and both are revocable: but it goes farther;

farther; for by the will he has made a diſpoſition of part of the real eſtate, which, if to take place, will break in upon the plaintiff's remainder in tail, *viz.* the deviſe of the benefit of the houſe to the wife: and the will is a continuance of the intent declared in the ſettlement. So that (261) the claim of this real eſtate in contradiction to the will comes ſtrongly within the reaſon of all thoſe caſes; coming up to *Walpole* v. Lord *Conway*; which was determined by me on foundation of an implication in the will of the teſtator's apprehenſion of that part of his wife's portion being part of his perſonal eſtate. But the caſes upon the head of ſatisfaction are quite on another principle. If indeed a foundation can be laid for an inquiry, whether this money paid aroſe out of the eſtate of *Eraſmus*, it would be another caſe; but I cannot preſume any part of the perſonal eſtate of *Eraſmus* come to the hands of *Hugh*, who came in as executor by ſubſtitution, and does not appear to have proved the will; no ſuch evidence being laid before me. And then taking it to be paid out of *Hugh*'s own money, there is no colour for the plaintiff's coming into equity to have the benefit of it.

Tenant in tail ſubject to an incumbrance, ſuffers a recovery of part, ſells part, and exchanges part: the land taken in exchange, not ſubject to a contribution of the incumbrance, the whole of which muſt be borne by the remainder.

A queſtion then aroſe of contribution; the brother having ſold that part of the eſtate, of which he had ſuffered a recovery; the purchaſer of which was to enjoy it free from incumbrance; it was inſiſted for the defendant, that the remaining part of the eſtate ſhould bear the whole burthen of this incumbrance. For the plaintiffs it was inſiſted, the eſtate taken in exchange for the other part, conveyed by the brother, ſhould bear its proportion; and that *Hugh*, coming in lieu of the incumbrancer, muſt be conſidered as having ſo much of the money in his hands.

LORD CHANCELLOR.

There is ſomething particular in this queſtion: but I think, there is no ſufficient ground for contribution; which would be making the conſideration taken by the brother for that part of the eſtate exchanged, liable in the hands of thoſe ſtanding in his place for part of the incumbrance: whereas the equity is the ſame, as if the brother had conveyed it to a purchaſer, in conſideration of money paid, inſtead of taking land to himſelf in fee. In which caſe, there is no ground for *Hugh* to come for a proportion againſt the aſſets of his brother, who might have barred the whole. Then the equity for the plaintiffs is not better than that of *Hugh* would have been: though in reſpect of the

the mortgagee he would have a right to have both parts of the eſtate liable for his ſatisfaction; yet on a bill by him for foreclosure or ſale, the equity would be, that the eſtate purchaſed ſhould not be liable, unleſs the other part was not ſufficient for the ſatisfaction.

The plaintiffs therefore are intitled under the will of the father to ſo much of the eſtate as was not conveyed by the brother, ſubject to 5800*l.* paid by *Hugh*. But as their claim is in contradiction to the will of *Hugh*, they muſt (262) wave their legacies therein, and let the bill be diſmiſſed, ſo far as it demands them. But no coſts on either ſide; for though naturally the coſts follow the redemption, the right to redeem has been diſputed, and it was a doubtful queſtion.

Graham *verſus* Graham, *June* 26, 1749. Caſe 133.

THE plaintiff truſtee for her ſon coming into poſſeſſion of the eſtate, whereof ſhe was dowable, was in receipt of the profits; and, being now to account, claiming an allowance for the profits of her dower.

Objected, that though ſhe might be intitled thereto under the head of juſt allowance in the account; yet as to the future profits, ſhe had no right to come into equity for them, but ſhould proſecute her writ of dower.

LORD CHANCELLOR.

I cannot deny the plaintiff an allowance, on taking the account, of ſo much of the profits as ſhe had a clear right to for her dower: and then as to the ſubſequent time, it would be ſtrange, if the court ſhould decree part of poſſeſſion and not ſecure it for the future; which would blow both hot and cold; denying her right on one hand, and granting it on the other.

Dowreſs on taking account being intitled to allowance for her dower; ſhall not be drove to her writ of dower for the future profits.

The plaintiff's next claim was of three annuities given by her huſband's father: the firſt, a grant by deed of 10*l.* *per annum* for a term of 99 years, on condition that ſhe maintained her ſon, and was charged on a particular eſtate: the ſecond, of 6*l.* *per annum* during her widowhood, given by bond: the third by his will of 10*l.* *per annum* charged generally.

The

The laſt was inſiſted to be a ſatisfaction, the court leaning againſt double proviſions. *Brown* v. *Dawſon*, 2 *Ver.* 498. and *Atkinſon* v. *Atkinſon*, *Feb.* 19, 1732, where a ſon having aſſets of his father ſufficient to anſwer an annuity, by his will gave an equivalent; and it was held a ſatisfaction by Sir *Joſeph Jekyl*. But however the plaintiff is not intitled to come into equity to recover the arrears of that annuity againſt a purchaſer for valuable conſideration without notice.

(263) LORD CHANCELLOR.

Deviſe of annuity cannot be a ſatisfaction for a larger one granted before; otherwiſe if the annuity by will was larger, or equal. But if the teſtator was chargeable with two annuities, and deviſes an annuity equal but to one, it will not be a ſatisfaction for either.

(a) The queſtion is, whether the latter annuity can be conſidered as a ſatisfaction for either of the other two granted in his life. For both together, amounting to 16*l. per annum*, that being but 10*l. per annum*, cannot be a ſatisfaction: nor can it be for the 10*l.* annuity granted by deed; although there are ſeveral caſes in which the court leans againſt double proviſions on the foot of parity between them. Though it is voluntary in reſpect of his grandſon, it is not ſo in reſpect of his daughter-in-law; who being by agreement to maintain her infant ſon for it, otherwiſe to ceaſe, is conſidered as a purchaſer; and the grandſon would have a right to come into equity by *prochein Amy* for maintenance thereout. Another objection to its being a ſatisfaction is, becauſe out of different funds; the firſt being out of a particular eſtate, the latter charged on the general fund of real and perſonal. But as to what is laſt ſaid, I am doubtful; and rather think, ſhe cannot come into equity; becauſe this does not come by way of allowance out of any thing, for which ſhe was to account, (for if ſo, and ſhe had a right to it, ſhe muſt have that allowance, whether againſt a purchaſer for valuable conſideration or not:) but this was a bill originally for ſatisfaction of arrears and growing payments; and then the rule, which muſt take place, unleſs the plaintiff can diſtinguiſh it, is, that a purchaſer for valuable conſideration without notice ſhall not be hurt in equity, but the remedy muſt be at law.

As to the 6*l.* annuity, which was nothing but a debt on his eſtate, I think, the laſt will be a ſatisfaction for it; for the perſon ſo indebted gives by his will a better annuity; which

(a) Supra, 519. Prec. Chan. 236. 2 Vern. 478. 1 Eq. Ab. 205. 1 Wms. 408. 2 Wms. 343, 553. 2 Atk. 300, 491. 3 Atk. 96. 1 Atk. 426. Theſe caſes as to ſatisfaction reſpect relations and ſtrangers.

which falls within all the rules eſtabliſhed of ſatisfactions. If it was a bond for payment of a groſs ſum, and he gave an equal or larger ſum by his will, it would certainly be a ſatisfaction. I do believe, the intent was, as has been ſaid for the plaintiff, to increaſe his bounty; and he has done it, by giving an additional 10*l. per Ann.* to the firſt 10*l.* As to what was further ſaid (that the court will not hold what is given by a will, a ſatisfaction for either, where ſeveral things are given before) there might be a great deal in it: and therefore if he was chargeable with two, and deviſed an annuity equal to one, I ſhould not have thought it a ſatisfaction for either; but it ſhould accumulate. But he was not a general debtor for both, only for the 6*l* annuity; having granted the 10*l* annuity by way of charge on a particular eſtate, and really for the benefit of the grandſon: ſo that he was debtor only for the other; and having given a higher, it cannot be diſtinguiſhed from the caſes of ſatisfaction.

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Aſton *verſus* Aſton, *June* 27, 1749.

Caſe 134.

(a) SIR *Thomas Aſton* in the ſame ſettlement, in which he makes himſelf tenant for life without impeachment of waſte, with full liberty to commit waſte, ſettles a jointure upon his wife for life without impeachment of waſte.

Poſt. 396. How far the court will reſtrain tenant for life without impeachment of waſte.

On ſettling another part, he creates a term on a truſt to ſecure a rent-charge of 300*l. per Ann.* to his wife, as a further part of her jointure, and afterward out of the rents and profits thereof to raiſe money from time to time, to reimburſe her expences in ſuſtaining and repairing her jointure eſtate.

After his death ſhe, having this charge on the eſtate of her ſon, lets this annuity together with the intereſt of 3100*l.* given her by her huſband's will, run in arrear for three years. Upon her ſon's marriage ſhe gave up the ſaid arrear due, and alſo 2000*l.* which he owed her, becauſe he could not otherwiſe make a jointure within the ſettlement. She ſaw him but twice afterward: he goes abroad; and there is an arrear of eight years during his life.

Upon

(a) 2 Eq. Ab. 758. 22 Vern. 523. 2 Vern. 738. 1 Wms. 528. 3 Wms. 267. 3 Atk. 215. Supra, 524, 546. 1 Brown, 166. Where tenant for life with liberty to cut timber for her own uſe at ſeaſonable times, was reſtrained from cutting ſaplings not proper to be cut as timber. In 2 Brown, 88, injunction for waſte granted againſt tenant for life without impeachment of waſte.

Upon his dying without iſſue the eſtate came to his ſiſter *Catherine*; who brought this bill againſt her mother Lady *Aſton* to enjoin her from committing farther ſpoil and deſtruction upon her jointure eſtate; and for ſatisfaction for the damage already done thereby; ſuggeſting that ſhe had cut down even ſuch timber, as was not fit for repairs, as young ſaplins, *&c.* not leaving a twig on the eſtate; and alſo to be quieted in the enjoyment of the lands free from the arrear incurred in her brother's life.

LORD CHANCELLOR.

The queſtions before the court are of that nature, as depend more on the latitude of diſcretion of a court of equity than many other caſes; and therefore more difficult for a judge to ſatisfy himſelf in the determination, he is to give; which is to ariſe on the circumſtances of the caſe, than in other caſes, where he might be guided by particular rules. Yet the court muſt go by ſome rule, and not make ſuch a determination relating to property, eſpecially real property, as may be attended with inconvenience and uncertainty.

As to the firſt queſtion, of the waſte, conſider it as it may in general concern tenant for life, without impeachment of waſte under a ſettlement; for though this is a particular caſe, the conſideration of the general, will give light therein.

(265) It is uſual in marriage-ſettlements to make the father tenant for life without impeachment of waſte; and ſometimes the words *with full liberty to commit waſte*, are added, as here, to the huſband's eſtate. But then it is moſt uſual to inſert reſtrictions, as *except in houſes, &c.* So in making grandfather tenant for life in voluntary ſettlements and deviſes; ſo of father, owner of the eſtate, and making the ſettlement. This therefore may concern all ſuch perſons, and the queſtion is, what a court of equity would do, if it aroſe againſt perſons in thoſe circumſtances? At common law, that clauſe, *without impeachment of waſte*, only exempted tenant for life from the penalty of the ſtatute, the recovery of treble value and place waſted; not giving the property of the thing waſted: but in *Lewis Bowle's* caſe, 11 *Co.* 79, it was determined, that theſe words alſo gave the property: the neceſſary conſequence of which was, that in general, unleſs on particular circumſtances, he was

was not to be reſtrained in equity; for that would be to determine, that he ſhould not make uſe of that property the law allowed him. But afterward ſeveral inſtances were conſidered, in which this very large power might be exerciſed contrary to conſcience, and in an unreaſonable manner by tenant for life; as where his act was to the deſtruction of the thing ſettled; which was the ground of Lord *Bernard*'s caſe, the ſtrongeſt that could happen: yet that was not an original caſe, without precedent or judicial opinion to ſupport it: as appears from a caſe 5 *J.* 1 (before *Lewis Bowle*'s caſe) which probably occurred then; though the determination there did not operate on it. If tenant for life without impeachment of waſte pulled down farm-houſes, in general I ſhould no more ſcruple reſtraining him, than I ſhould from pulling down the manſion-houſe, (unleſs where he pulled down two to make into one in order to bear the burthen but of one;) it tending equally to the deſtruction of the thing ſettled. If therefore he ſhould grub up a wood ſettled, ſo as to deſtroy the wood abſolutely, I ſhould reſtrain him; which is the meaning of the words in that caſe, 5 *J.* 1. *viz. ſuch voluntary, malicious, intended waſte*; and in *Abrahal* v. *Bub*, *Paſ.* 1680. (ſaid to be in a manuſcript of Lord *Nottingham*'s collection, which I believe, I have alſo ſeen,) it is termed *extravagant and humourſome waſte*. So in 2 *C. C.* 32, where the *Lord Chancellor* declares, he would ſtop the pulling down houſes in the caſe of tenant in tail *apres poſſibility*, *&c.* which is carrying it a good way; as he has power to commit waſte, becauſe the inheritance once was in him: and alſo in the caſe of tenant for life by expreſs grant. So in (b) *Cooke* v. *Whaley*, *Eq. Ab.* 400. Since Lord *Bernard*'s caſe I have gone farther, and reſtrained the taking down trees for ornament and ſhelter to the houſe: as in the caſe of *Packington* v. *Layton*, and other caſes: but a little farther ſtill in Sir *Francis Charlton*'s caſe; who was reſtrained from cutting down timber growing in an avenue and planted walk in a park; but it depended on the ſame principle: and though there was a lane between the houſe and park, yet it was of the ſame kind with *Packington*'s caſe, where (266) the houſe ſtood in the park; they being planted to anſwer the houſe, and for its ornament and ſhelter. But there is no caſe of tenant for life without impeachment of waſte, where it has gone farther. What is inſiſted on for the plaintiff, is true in general; that law or equity does not depend on the particular caſes, but on the general reaſon running

(b) Prec. Chan. 454, S. C.

running through them: and therefore if a new caſe happens, not the ſame in *ſpecie*, but eſſentially within them, the ſame rule ought to govern. It is therefore inferred, that the court ought in general to grant an injunction againſt tenant for life without impeachment of waſte, for cutting down any timber not full grown or proper for building; or any, the doing of which might be a ſpoil or prejudice to the eſtate for the future. Something of that kind might be wiſhed for; but it is in general difficult to attain and inconvenient to do it. Nor does it fall within the reaſoning of the caſe mentioned. Was the court to take ſuch large ſtrides, reſort muſt always be to a court of equity; for no certain rule can be laid down, as it cannot be taken from the value of the trees; which will differ according to the ſort and circumſtances: nor from the purchaſe of eſtates; and ſome timber may be fit for one kind of building, not for others. But the reaſoning of the caſes of pulling down farm or manſion-houſes, or trees for ornament or ſhelter does not come up to this; for the conſequence of cutting down timber, perhaps too young, does not tend to the deſtruction of the thing ſettled: although it tends to its prejudice for a time; for timber will grow again in a few years: not ſo of houſes. Nor will young trees planted in avenues pulled down ſerve for the purpoſe as before; for having been put there for the convenient enjoyment of the houſe, they are conſidered as appurtenant thereto, and can no more be deſtroyed by ſuch tenant for life than the houſe itſelf. But it would be very dangerous for the court to uſe ſuch a latitude as to extend this to the taking away the profits of the eſtate by tenant for life to the prejudice of the remainder man; which his eſtate for life without impeachment of waſte gives him liberty to do.

This on the general queſtion relating to tenant for life without impeachment of waſte under a ſettlement.

Next conſider, how it ſtands on the circumſtances; which are very ſpecial, and which differ it from the caſe of a father making a ſettlement on a ſon. But it is all in his own hand writing, who does not appear to have been bred a lawyer: and though a counſel was ſaid to be employed, there is no evidence thereof. It is natural to conclude, that from the variety of expreſſions in the additional words to the clauſe; wherein he makes himſelf tenant for life, he thought, there was ſome difference. Beſide, the term for her reimburſement is extraordinary, and abſurd to ſuppoſe he meant to leave her at liberty to cut down and

ſtrip

ſtrip the eſtate of every ſtick of timber (which are the natural *botes* for repairs) and then to come by this term to be reimburſed her expences in buying timber for repairs: it being contrary to the plain intent; which was, that ſhe ſhould be tenant for life, without impeachment of waſte to prevent trouble in little matters; but ſtill that the timber growing on the eſtate, and the natural fund for it, ſhould be applied for that: but that ſhe ſhould be reimburſed out of this term, what ſhe ſhould pay out of her own pocket. Therefore as the defendant has cut down timber on this eſtate without applying it to repairs, ſhe ſhall have no benefit of this term, till ſhe has reimburſed to the eſtate, what ſhe has ſo unreaſonably cut away: and as to the future, the evidence being that ſhe has left no timber fit even for repair of farm-houſes, I will reſtrain her by the decree from cutting any more timber off the eſtate without leave of the court.

The next queſtion is as to the demand of the arrear of 300*l.* annuity, and the intereſt of the 3100*l.*; to which, it is inſiſted, the defendant has loſt her right upon two grounds: firſt, that ſhe muſt be taken to have releaſed this arrear to her ſon; or elſe that her permitting him to enjoy the eſtate without demanding it was in order to favour him fraudulently to the prejudice of the remainder. No authority is cited for ſuch a reſolution; therefore as it is a new caſe in *ſpecie*, and the defendant expreſsly denies by her anſwer, that ſhe releaſed or remitted it, but, on the contrary, hoped, he would pay her; it is only to be inferred from her lacheſs and acts: and it is carrying it too far to ſay, becauſe the owner of a charge upon an eſtate lets it run in arrear eight years, it muſt be preſumed abſolutely releaſed. There is no ſuch ſtatute of limitation to bar her: and no ſuch length of time inferring preſumption of payment. It is compared to the caſe of pin-money ſuffered to run in arrear; which ſhall not be allowed for more than one year: but that is not merely on a ſuppoſal of her having given them up to the huſband; but on this, that, having lived with the huſband, ſhe is ſuppoſed to have received ſatisfaction that way. But where the wife lived ſeparate from the huſband (which was the caſe of Lady *Derby*) and had no allowance from him, the court would decree an account, as far back as the arrears go; becauſe there could be no ſuch preſumption: which ſhews, that the caſes of pin-money do not go on length of time: it is compared alſo to the caſe of bills of exchange, where credit is given beyond a reaſonable time: but that ſtands on a different reaſon.

Owner of a charge on an eſtate lets it run in arrear eight years; not to be preſumed abſolutely releaſed, or intended to prejudice the remainder.

Pin-money.

Bills of exchange.

reaſon. The drawer is preſumed to have money in his hand to anſwer it: and therefore if the payee does not uſe diligence to get it, but ſuffers the drawer to go on, it is loſt by his default in ſtanding by, and ſeeing the fund drawn out, in a manner he ought not to do; and it does not go upon the intent to give it away. Then the caſe put of the mortgage concludes againſt the plaintiff. If a prior mortgagee does not bring an ejectment to recover poſſeſſion, and the intereſt runs in arrear, a ſubſequent mortgagee ſhall notwithſtanding not be permitted to redeem him without paying the whole intereſt ſo run on; becauſe though the ſecond mortgagee could not enter, he was not without remedy; for he might have brought a bill to redeem, and ſo had the eſtate himſelf: but if he did not, this court has often appointed a receiver to keep down the intereſt; which the court will not in general do, unleſs where prior mortgagee will not enter: but if he does not take that remedy, he ſhall not redeem without paying that arrear: and the mortgagee often ſuffers the arrear to run on with a deſign to get in the eſtate, on which he lent his money, and become the purchaſer: which may be called an ill intent, yet ſhall he not loſe his intereſt. Then fraud and colluſion is never preſumed, but muſt be proved, either expreſsly, or by neceſſary conſequence from the acts done. The defendant was very bountiful to her ſon: and though it may be called a deceit on the ſon's power to make a jointure, it was an honeſt one in this caſe; parting with her own money to induce him to marry. It muſt not be thence inferred, that the defendant by this favour to her ſon, intended to prejudice the remainder; which ſhe could not then ſee would come to the plaintiff, as the ſon might have had iſſue, who would come to the eſtate before the daughters of his father: nor can the defendant be preſumed to have left this burthen to prejudice ſuch iſſue. There is no ground then that ſhe ſhould loſe this demand. But another circumſtance is admitted, beſide the not appearing that ſhe intended to remit this in favour of her ſon, *viz.* that the defendant has now ſeven daughters, beſide the plaintiff, who is owner of this large eſtate as tenant in tail; and it is reaſonable for the mother to endeavour to increaſe her own perſonal eſtate, to enable her to make a proviſion for the reſt.

Mortgage.

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Hopkins

Hopkins *verſus* Hopkins. Caſe 135.

JOHN HOPKINS, (c) being by the decree of Lord *Talbot* intitled to the rents and profits of the eſtate deviſed by Mr. *Hopkins* till ſome perſon came *in eſſe*, who ſhould be intitled to the eſtate in poſſeſſion according to the will, although the actual enjoyment of the whole was ſuſpended by the proviſo in the will; had afterward a ſon, who was the firſt perſon ſo intitled to take this eſtate by executory deviſe according to the decree; but that ſon died. His father was intitled out of the rents and profits for his maintenance by the ſaid proviſo; but the queſtion was, what ſhould be done with the profits over and above that maintenance?

Contingent remainder upon an executory deviſe.

Profits undiſpoſed deſcending to heir at law.

The ſon of *Anne Dare* brought a bill for that ſurplus, as the firſt perſon in being capable of taking poſſeſſion under the will.

Lord *Hardwicke* (d) had been of opinion againſt him; for as by the ſaid decree he was not intitled to the eſtate in poſſeſſion, he conſequently was not intitled to the rents and profits: that as this executory deviſe was once veſted, the reſt were contingent remainders upon that executory deviſe: and that the (e) inheritance was ſufficient to ſupport that truſt, although no truſtees to ſupport, *&c.* were inſerted.

Contingent remainders ſupported, though no truſtees to ſupport inſerted.

John Hopkins had no other ſon, but his daughter had a ſon: and the queſtion now was, whether that ſhould determine the right of *John Hopkins* to thoſe profits during the life of that ſon.

LORD CHANCELLOR.

I am of opinion, it ſhall not; for that can only be on the foot of that ſon's being the perſon intitled to the poſſeſſion; which he cannot be, as he is in the ſame caſe with the ſon of *Dare*: ſince *John Hopkins* may ſtill have a ſon born, who will take before the ſon of his daughter, as the court has held this to be a contingent remainder upon the executory deviſe. The ſon of the daughter then is not intitled

(c) Wms. 33. Douglas 323.
(d) 1 Atk. 581.
(e) Truſtees of the inheritance ſufficient to ſupport contingent remainders, 2 Vol. 230.

titled to maintenance out of the profits; not being intitled to any of the profits at all. Nor can the repreſentative of the dead infant be intitled to theſe profits: and none but *John Hopkins* can; whoſe right thereto is not determined, till a perſon comes *in eſſe*, who is intitled to an eſtate for life in poſſeſſion, which this ſon of the daughter is not; as other perſons may now come *in eſſe*, who could not take, if he once took; for then no perſon coming under a prior limitation can move or turn him back; for it will not open and ſhut, as it will at common law: though it was endeavoured at by Lord *Macclesfield*.

Vide caſes in the time of Lord Talbot, where the will is ſtated, 44.

Caſe 136. K. *verſus* Daly, *July* 24, 1749.

In Exchequer.

Where notice ſhould be given of the iſſuing a commiſſion for an inqueſt.

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MRS. *DALY*, having been found heir at law to the Duke of *Buckingham*, and hearing that an inqueſt of office was to iſſue for the crown to inquire, whether by the attainder of one of her anceſtors in *Ireland* the lands did not *eſcheat?* now moveth the court for an order to give reaſonable notice of the iſſuing ſuch commiſſion, citing ſeveral old ſtatutes, which have provided penalties on the ſheriff for executing them privately: as 34 *E.* 3. 36 *E.* 3. 23 *H.* 6. 17. 1 *H.* 8. 8. and a caſe in the time of *C. Baron Pengelly*, when an inquiſition was ſet aſide for a ſheriff's refuſing to hear evidence.

This was oppoſed by the *Solicitor General*, as it would give the jury power to try a mere matter of *law*; whether the attainder can affect lands in *England:* which queſtion being debated before the *Attorney General*, he was very clear for the crown. There is no precedent of ſuch notice; *Inqueſts of office* are merely *ex parte*, and not concluſive evidence: and ſince the ſtatute of *E.* 6. great alteration is made therein, as the defendant may now traverſe ſuch inqueſt.

And for that reaſon, and it being the general rule that no notice need be given of executing *inqueſts of office*, Lord *Chief Baron Parker*, although he thought this a favourable caſe for notice, was againſt introducing new inventions in practice and altering the law.

But

But the three *Barons*, *Clarke*, *Clive*, and *Legg*, were of a different opinion; for though they agreed, that if this was an application for a general rule, that in all caſes of *inqueſts* notice ſhould be given, they ſhould be againſt it: yet the circumſtances of this caſe conſidered, it ought to be given. If the party has an opportunity by being preſent, ſhe has certainly a right to be heard, and lay her evidence before the jury; nor is there any objection to the aſſiſting the party to do ſo: and though the attainder may be matter of law, there are ſeveral facts, of which the jury have a right to judge: nor is this any injury to the crown, whom it does not prevent from laying their caſe before the jury at the ſame time, and this can happen but ſeldom; for there are few caſes in which the party can come, and ſhew a reaſon for ſuch notice; which is previouſly neceſſary. And although the inqueſt may be traverſed, it is a great hardſhip on the ſubject to contend with the crown; and ſecurity muſt be given, which may be difficult to get for ſo conſiderable an eſtate. What the jury aſcertain, which ought to be the truth, may be different, if heard *ex parte*, from what it would otherwiſe be. The ſeveral ſtatutes before *E.* 6. are material: and the ſame reaſon which introduced them, the requiring things to be publicly executed, holds in the preſent caſe. Therefore ſuch order for notice ought to iſſue.

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Chapman *verſus* Hart, *June* 29, 1749. Caſe 137.

——TOLLER, captain of the *Warwick* man of war, deviſed all his lands and tenements in or near *Fowey* to the plaintiff; and farther gives to her for her care of him during his ſickneſs at *Antigua* 500*l.* and all his goods and chattels in his houſe, and on board the *Warwick*, and alſo his engraved ſilver ſalver, and two ſets of caſters now on board the *Warwick*, to be by her diſpoſed of to ſuch of his nephews and nieces as ſhe ſhould find moſt friendly to her, they to have them, and to be kept as *memorandums* of him. He died, after he had quitted the *Warwick*; and ordered his goods on board the *Somerſet* under the captain's care.

The will was executed in the preſence of two witneſſes only; and therefore admitted on the part of the plaintiff, that it was not ſufficient to paſs lands and tenements in fee: but inſiſted, that if the teſtator had any leaſehold-lands or tenements in or near *Fowey*, the will, being duly proved

in the *eccleſiaſtical* court, was ſufficient to paſs them: and that there ſhould be an inquiry for that purpoſe; for that on the authority of *Roſe* v. *Bartlet*, *ut res magis valeat*, the leaſehold would paſs, as the freehold could not.

Cr. C. 293. *Sal.*

Againſt which it was ſaid, the court would not put the parties to the expence of inquiry, where there was no ground for it: that there was any leaſehold was denied by the anſwer; which was not replied to. In the late caſe of *Smith* v. *Smith*, where one deviſed an annuity for ever out of all his lands to a charity, it being clear, that it could not come out of the freehold, it was argued, that to complete the intent it ſhould take effect out of the leaſehold. But his *Lordſhip* held, that he would not alter the rules of law, merely for the ſake of making a void will take effect.

It was next inſiſted for the defendant, that the goods, not being on board the *Warwick* at the teſtator's death, did not paſs. Although wills ſpeak from the making to ſome purpoſes, as in the caſe of land, or a ſpecific thing, yet not in ſuch general deviſes of goods; which mean goods in ſuch a place, at the teſtator's death, like the deviſe of all furniture in a houſe. 2 *Ver.* 688, 739. and yet the deviſe of furniture is more a ſpecific bequeſt than of goods on board a ſhip. The general rule in *Swinburn*, that the time of making the will, not of the death of the teſtator, is to be regarded, has ſo many exceptions, that it can hardly be called general. *Swinburn* by ſpecific things means identified by the will itſelf; but that is not the caſe here, which is like a deviſe of all his horſes in a ſtable, or hay or corn in a barn, meaning only thoſe at his death: and the confining the time of *now on board* to a few particular things makes it like the caſes in *Eq. Ab.* 199, where money did not paſs, becauſe ſomething particular was deviſed beſide, and it ſhews a different intent.

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To which it was replied, that this would be a ſpecific bequeſt, if the goods were ſtill on board the *Warwick*; nor would it abate in proportion. The only difference is, that inſtead of mentioning them in a particular ſchedule, he has compriſed them all, and deſcribed them under the words *goods in the Warwick*; and where the locality is mere deſcription, not eſſential to the deviſe itſelf, the removal is no ademption of the legacy; for which there muſt be always *animus revocandi*; which is not ſhewn here. As to the caſes in *Ver.* there was a neceſſity for that conſtruction, being

being things fluctuating and perpetually waſting; and therefore determined to mean thoſe at the death: but no ſuch neceſſity for ſtanding goods.

LORD CHANCELLOR.

Though the plaintiff has not behaved according to the ſtrict rules of law, in poſſeſſing her legacy without the conſent of the executor; the ſtrict rules of the civil law do not hold here ſo as to be a forfeiture. It is not certain that the teſtator had any leaſehold in or near *Fowey*: and by the anſwer it ſhould rather ſeem, he had not: If there ſhould appear to be both (for I muſt take it, there were freehold) and the law was with the plaintiff, ſo that ſhe would be intitled thereto, it would be a ground for the direction of an inquiry; for the anſwer is not a poſitive negation of any leaſehold. But if, let the fact come out how it will, the law ſhould be againſt the plaintiff, I ought not to direct an inquiry; which would be of no benefit: and I am of opinion, that though it ſhould appear the teſtator had leaſehold as well as freehold, the plaintiff could not be intitled. It is clear ſince the caſe of *Roſe* v. *Bartlet*, that ſuch a deviſe ſhould be confined to the freehold, and the leaſehold ſhould not paſs, unleſs there were only leaſehold; for then they ſhould, that the will may have ſome effect. But the diſtinction taken for the plaintiff does not hold; for it is applying the reaſon in that reſolution in *Roſe* v. *Bartlet* to a different purpoſe from what it is there; where it is applied to the conſtruction of the words, the intention of the teſtator ariſing from the fact. Here it is a preſumed intent, ariſing not from the words, but from a defect in the execution of the inſtrument, and his ſuppoſed knowledge in the law of that defect, and that he intended to paſs only what might paſs. But that defect in the execution of the inſtrument cannot warrant the court to make a different conſtruction from what it would if duly executed; which then would be, that the freehold lands only would paſs. Suppoſe a caſe (which though I do not know to be determined, I ſhould not doubt to determine ſo) of a perſon ſeiſed of freehold and copyhold in *D.* who ſurrenders to the uſe of his will, and deviſes all his lands and tenements in *D.* to a child: there being a ſurrender, both freehold and copyhold would paſs, if the will was duly executed according to the ſtatute of frauds: but if no ſurrender to the uſe of the will, only the freehold would paſs; to which *lands* and *tenements* generally mentioned ſhall be applied; there being no ſurrender to the uſe of the will, to

Deviſe of all lands and tenements in or near *Fowey*, the will not executed properly to paſs freehold: nor could the leaſehold, if any there, paſs thereby.

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A. ſeiſed of freehold and copyhold by a will not properly executed deviſes all his lands and tenements to a wife and child; and no ſurren-

der to uſe of the will, the court will not ſupply defect of ſurrender.

to ſhew a different intent. Suppoſe that will executed in the preſence of two witneſſes, or of one only; thoſe general words uſed; and no ſurrender: though this were to a child or wife, the court would not ſupply the defect of ſurrender to the uſe of the will, or compel the heir at law to ſurrender the copyhold to the deviſee, becauſe the will not duly executed; when, if duly executed, the court would not have ſupplied that defect: for ſuch variation of the conſtruction would be very dangerous, and might make terms, and perhaps terms attendant on the inheritance, to paſs. There is no ground therefore for an inquiry.

What paſſes by deviſe of all goods and chattels in a houſe. Not a bond or *choſe in action*.

As to the next queſtion: undoubtedly no goods and chattels in the houſe can paſs, but ſuch as were properly in poſſeſſion, not *choſes in action*; except bank notes, which the court conſiders as caſh; for theſe words may certainly extend farther than to bare furniture: and if any ready money in the houſe (if (f) not an extraordinary ſum, and juſt received) that would paſs. In the Counteſs of *Ayleſbury*'s caſe, I was of opinion, that by deviſe of all things in a houſe, money and bank notes paſſed to the teſtator's wife, and that the teſtator meant to conſider the notes as caſh: * but bonds do not paſs; not admitting of a locality, except as to the *probate of wills, &c.* I think, there is a difference between a legacy of goods on board a ſhip, and in a houſe: although I know of no caſe of this kind. The general rule is, that in a deviſe of all goods in a houſe, that deſcription relates to the death of teſtator; and if removed, they would not paſs. The Duke of *Beaufort*'s caſe, 2 *Ver.* 739, but in ſuch a deviſe of goods on board a ſhip, it muſt be ſuppoſed to be done in conſideration of the ſeveral contingencies and accidents they were liable to: and if it ſhould be determined, that if by any accident they ſhould not be on board at his death, they ſhould not paſs; it would defeat ſeveral marine wills. If the goods were removed to preſerve them, the ſhip being leaky, or likely to founder; or if he is removed to another ſhip, (which is a contingency he is ſubject to daily) and he is forced to obey: this would not defeat the legacy. But farther ſtill; upon ſuch a contingency, goods in a houſe would paſs: as ſuppoſe the goods removed on the account of fire; and ſoon after, before they could be reſettled, the teſtator

Difference between a legacy of goods on board of ſhip and in a houſe.

In the former caſe they may paſs though not on board at teſtator's death: and even in the latter caſe if removed on account of fire, &c.

(f) In Prec. in Chan. 8, by ſuch a deviſe, a ſum of money was held not to paſs, as being too large for teſtator to be ignorant of its being in his houſe; and if he intended it ſhould paſs, he would not have couched it under ſuch general words.

* 1 Brown, 127.

teſtator dies: they ſhould be conſidered as being in the teſtator's houſe at his death; and the legacy is not defeated by that accident. So the removal of theſe goods out of the ſhip, it being a deſcription ſo precarious, does not infer an intention to revoke; which muſt always be in ſuch caſes; or at leaſt an intention in the teſtator in the creation of the legacy, that if the goods ſhould not be there at his death, they ſhould not paſs. As to the ſuppoſing a different intention from the word *now* in the ſubſequent gift; that rather turns againſt the defendant. There might be ſomething in it, if that clauſe of the plate was not introduced for a particular purpoſe, for the ſake of the deviſe over, not to increaſe the bequeſt; which makes it like the caſe, where the executor was held not to be excluded from the reſidue by the bequeſt of a particular thing, becauſe it was not mentioned for the ſake of giving any thing new, but of the limitation. (274)

Potter *verſus* Potter, *July* 6, 1749. Caſe 138.

Rolls.

UPON a bill to eſtabliſh the will of the late *Archbiſhop of Canterbury*, it was objected for defendant, the heir at law, that the will was not proved; and that the anſwer only believed a will was made, but did not directly admit it, and was not replied to: and that in the late caſe of *Ogle* v. *Cook*, *December* 10, 1748, Lord *Chancellor* would not eſtabliſh a will not ſufficiently proved, but ordered it to ſtand over.

The court will not decree the eſtabliſhment of a will neither proved or admitted.

Ante.

And *the Maſter of the Rolls* ſaid though it was generally true, that what the defendant believes, the court will believe; yet there was no precedent, where the court decreed the eſtabliſhment of a will not proved or admitted by the heir at law: and the cauſe muſt ſtand over with liberty to reply.

Lewis *verſus* Hill, *July* 6, 1749. Caſe 139.

SIR *Roger Hill* upon his marriage covenanted, that he, his heirs, executors or adminiſtrators ſhould purchaſe a good eſtate of inheritance in fee, free from all charges, *&c.* of the yearly value of 600*l.* or more; which lands ſhould be ſettled to his uſe for life, afterward part thereof

Whether heir at law intitled to performance of a covenant in marriage articles to

purchaſe and ſettle lands. And how far the covenant ſatisfied.

thereof for a jointure, and the whole upon the iſſue of the marriage, remainder to his right heirs for ever.

He afterward purchaſed lands, which he did not ſettle according to the covenant, but deviſed away in a different manner: and after making the will he purchaſed the inheri-
(275) tance of ſeveral houſes in *London*, and ſome lands of 70*l.* *per ann.* and died without performing the covenant.

The bill was brought by the plaintiff and his wife, as heir at law, againſt the perſons intitled to the perſonal eſtate, to have the covenant performed by the purchaſe of lands of 600*l.* *per ann.* thereout.

For plaintiff. The firſt queſtion is, whether the heir at law is intitled to come into equity for a ſpecific performance of theſe articles againſt the executor? which queſtion has often ariſen; and was determined at laſt, that he is. *Lechmere* v. *Lechmere*; *Vernon* v. *Vernon*; and *Deacon* v. *Smith*, on a bill of review, *March* 26, 1746. Every claimant under the articles has ſuch right: and therefore the plaintiff, though ſtanding in a different light from the others, has the ſame right to have them ſubſtantially performed, on the ground that things, which ought to be done, are looked on here as done.

Tal. 80. In the houſe of *Lords*, 1732.

Next whether what has been done ſhall amount to a performance; although not done by deed, it ſhall have the ſame effect; which is the foundation of *Blandy* v. *Widmore*, and that depends entirely on the intent; becauſe he is maſter, as between his own heir and executor what ſhall be conſidered as land, what as money, and whether he will leave an equivalent to the perſon, to whom he was under an obligation; as in *Wilcox* v. *Wilcox*, 2 *Ver.* 558. The general heads, from which this intent is to be collected, are from the nature of the act, the ſort of purchaſe and poſitive expreſs proof; of the laſt of which there is none here. It can only be implied from his purchaſes, that he meant to apply them to the covenant: the force of which preſumption may be taken off: as by a ſale or deviſe inconſiſtent with the covenant: nor can it be ſaid, there was a ſpecific lien by the articles. It was ſo held in *Deacon* v. *Smith*, and that the intention was the rule. If then the preſumption is deſtroyed as to eſtates purchaſed before the will, much leſs does it hold as to thoſe ſubſequent; for as to the 70*l.* *per ann.* they were parcels of land joining the eſtate, for the convenience of which they were purchaſed,

2 Ver. 709.

purchaſed, not with a view to anſwer the covenant: as to the houſes, they from their nature being different from lands, and a wearing eſtate, cannot anſwer the covenant, by which was meant land: ſo that if it had been the bare ground rents, which it is not, that would not do. It was held in the caſes before mentioned, that reverſions, which were argued to be a ſatisfaction *pro tanto*, could not be ſo applied. Though a ſettlement of lands is not always in contradiction to houſes, theſe houſes could not be a purchaſe proper to be ſettled on the iſſue: nor could tithes be ſettled under theſe articles.

For defendant. Theſe purchaſers ſhall be conſidered as anſwering the ſettlement ſo far: and the purchaſe of houſes es in poſſeſſion, being an inheritance, is a compliance with the covenant. By deviſe of lands in a place, houſes, if no lands, will paſs: nor ought this to be ſent to the *Maſter* to ſee, whether it is a proper purchaſe. (276)

LORD CHANCELLOR.

I will look into the caſes cited: but though I muſt go as far as the precedents, I will not go farther in decreeing a performance.

The cauſe was afterward compromiſed.

Debenham *verſus* Ox, *July* 7, 1749. Caſe 140.

(g) THE bill was for delivering up a bond given by the plaintiff to the defendant's wife, in conſideration that ſhe would make uſe of the influence and power, ſhe had over *Thomas Yerle*, the plaintiff's grandfather, an old man of eighty-two, that he ſhould diſpoſe of his whole eſtate for the plaintiff's benefit, and give ſecurity that he would not alter the will he made in the plaintiff's favour.

Bond given as a reward for uſing influence over another's eſtate, for benefit of the obligor, decreed to be delivered up without coſts.

For plaintiff. It was inſiſted, that ſuch bonds ought not to be encouraged in equity; being upon a conſideration contrary to the policy of the law, and like marriage brocage bonds.

For

(g) 3 Wms. 394. Talb. 97. 5 Burr. 2698. 1 Brown, 124.

For defendant. A bond is not reſcindable merely, becauſe gratuitouſly given; for a voluntary bond may create a debt, unleſs ſome fraud. Marriage brocage bonds are inconvenient to the public on this foundation, that theſe contracts ſhould be made on other motives than thoſe of intereſt, and are almoſt reſcindable of courſe in equity. In *Beckly* v. *Newland*, 2 *Wms.* 182, though a kind of partition treaty of a man's eſtate before his death, it was carried into execution.

LORD CHANCELLOR.

This is new *in ſpecie*; there being no caſe of a bond by way of reward for influence over another perſon's eſtate, or the benefit of the obligor. As to the bond itſelf, it is admitted to be given without any conſideration: and that, which is inſiſted on, would be going further than the policy of the law will admit, which ought not therefore to prevail; eſpecially as the grandfather from his age was probably weak, and thence more liable to ſuch influence. I remember a paſſage in *Tully* of a will obtained by doing complaiſant and flattering offices about a perſon, *Blanditiis*, &c. *Beckley* v. *Newland* is different; the contract there being framed on a contrary principle to this, *viz.* the avoiding all undue influence. Yet this is not like marriage brocage bonds; which proceed on another ground, that nothing inconſiſtent with the open contract on marriage ſhould be done.

(277)

Coſts.

But as to coſts: the defendant ought not to pay them. Indeed there is hardly a caſe of a bond ſet aſide for fraud or improper conſideration, but it ought to be with coſts, from the bad ingredient; but this differs; the plaintiff himſelf being *particeps criminis*; ſo that if it had not been for the ingredient of public policy, he could hardly have come here for relief. (h) In all thoſe caſes the court ſets them aſide, not for the party's ſake, but for the benefit of the public: as a marriage brocage bond: or a bond by the huſband to return part of the wife's portion to her father, without the privity of the huſband's relations; or on the other hand a contract to give back part of the eſtate. In all this, the huſband has done wrong, and is *particeps criminis*; yet becauſe the objection, that infects the bond, ariſes from public conſideration, the court will relieve; yet in ſeveral caſes have not given coſts: that is where the huſband himſelf

Bonds in fraud of marriage agreements ſet aſide on public policy.

(h) Supra, 503. 2 Vol. 264, 375,

ſelf has come to be relieved, againſt what he has done with his eyes open. And here the plaintiff himſelf ſolicited to give this bond, and got it prepared: the bond therefore was given upon undue conſideration, which ought to receive no countenance in a court of equity, and ſhould be delivered up. But by reaſon of the part the plaintiff himſelf appears to have had, no coſts on either ſide.

Lord Trimleſtown *verſus* Colt, *July* 8, 1749. Caſe 141.

(i) *ISAAC COLT* having by will given his daughters portions, charged firſt on the perſonal, then on the real eſtate, with intereſt in mean time for their maintenance; the queſtion was, what rate of intereſt?

Daughters portions by will charged on perſonal, then on real eſtate with intereſt for maintenance; ſo far as the perſonal deficient, they carry but 4 *per cent.*

The daughters contending it ſhould be 5 *per cent.* legal intereſt being always meant by *intereſt* in general, it being ſo determined where upon perſonal eſtate; and this being a proviſion for a child by a father was with a liberal view.

Againſt which it was inſiſted, there ſhould be but 4 *per cent.* this being to be eſteemed as an original charge on real eſtate.

LORD CHANCELLOR.

If theſe legacies were merely to come out of perſonal, which was ſufficient, being given with intereſt, it ſhould be conſidered as legal intereſt: but if the perſonal eſtate is deficient, it ſhould be conſidered as a charge upon real. I will not ſay, but there may be caſes, where charges in general on lands with intereſt may be conſidered as legal intereſt; but there is ſomething particular in this being expreſsly for their maintenance; which makes it a middle caſe, and different from a general charge with intereſt in mean time: the reaſonable conſtruction being to determine it to be ſuch rate of intereſt as is uſually given for maintenance in caſe of a portion charged on land, (k) *viz.* 4 *per cent.* So far therefore as the perſonal eſtate is deficient, let it be but four.

Kemp

(i) Prec. Chan. 337, 405. 2 Wms. 419. 2 Atk. 343. 2 Vol. 487.
(k) Ante, 171. 2 Vol. 239.

Case 142. Kemp *verſus* Weſtbrook, *July* 8, 1749.

Statute of limitations. Bill lies by aſſignee of a bankrupt for delivery of goods pledged by the bankrupt notwithſtanding the ſtatute of limitations.

THE bill was brought by an aſſignee under a commiſſion of bankruptcy againſt *Cordwell*, for the re-delivery of jewels and plate pledged by him to the defendant, who had alſo given a promiſſory note for the delivery over of thoſe goods to the aſſignee, or the value of them, upon the aſſignee's paying him all that was due.

The ſtatute of limitation was inſiſted on by way of defence; which, being to quiet poſſeſſion, is in general to be conſtrued favourably. Beſide the plaintiff has no right to come into equity; this not being like the caſe of a real eſtate, where time is given for payment, and on non-payment to veſt in the mortgagee; for there a remedy muſt be in equity, as none at law: but this is a mere pledge; and if this is allowed, there would be an infinite number of ſuch bills for the redemption of ſuch depoſits. *Trover* will lie for this, in the ſame manner as if the pawn was diſpoſed of, and damages for the converſion: and then after the time limited by the ſtatute for an action of *trover*, it could not be recovered, notwithſtanding the right to redeem.

LORD CHANCELLOR.

1 *Bul.* 36. Pawnor has time during life, where no time given for redemption. Remainder man not bound to enter on forfeiture of the particular tenant, and if he comes within his time after the remainder attached,

There is no colour for the ſtatutes being a bar to this demand: no time being given for redemption, *Cordwell* had time during life to redeem, according to the caſe in *Bulſtrode*. Then ſo had the aſſignee till tender or payment of the money; before which, on the face of the note, *trover* would not lye. It is ſomething like the caſe of a remainder man expectant on an eſtate for life or years, to whom a right to enter or bring an ejectment is given by the forfeiture of the tenant for life or years: yet he is not bound to do ſo; therefore if he comes within his time after the remainder attached, it will be good, nor can the ſtatute of limitations be inſiſted on againſt him for not coming within twenty-years after his title accrued by forfeiture. I will not ſay in general, that there is a right to come into equity in every caſe to redeem pledged goods: yet there are caſes, where it may be. As the pawnee of ſtock is not bound

bound to bring a bill of foreclosure of the equity of redemption of the ſtock, but may ſell it, and notwithſtanding, the mortgagor may bring a bill here, for an account of what is due, and to have a transfer to him. But there is a ſtrong reaſon for it in this caſe; the plaintiff, being an abſolute ſtranger to what is due, has a right to come here to know it, in order to make a tender, which he cannot do without tendering the preciſe ſum; and therefore could never make it, if not allowed to come here firſt to know that ſum.

the ſtatute of limitations will not bar.

In what caſe a bill may be for redemption of pledged goods.

Underwood *verſus* Hithcox, *July* 11, 1749. Caſe 145.

THE defendant articled with his uncle for the purchaſe of a copyhold eſtate in fee. The plaintiff ſoon afterward propoſed to the defendant to purchaſe this eſtate from him: and an agreement was entered into for that purpoſe. The uncle ſurrendered it to his nephew and his wife, and to the heirs of their bodies, remainder to the nephew in fee.

For plaintiff. It was inſiſted, that the defendant's thus taking a conveyance of the legal eſtate in a different manner from what he was intitled to in equity, by placing the eſtate in his wife voluntarily, and without conſideration, was fraudulent, and made him guilty of a breach of truſt with reſpect to the plaintiff, in contradiction of whoſe agreement with the defendant it was; of which agreement the court therefore ought to decree a ſpecific performance. The uncle might have been compelled to carry thoſe articles into execution, and ſhould therefore be conſidered as truſtee for the defendant, and as to the objection, that the conſideration by the plaintiff was inadequate; the annual, not the groſs value of the eſtate is only put in iſſue; and therefore the defendant ſhall not examine as to the groſs value.

LORD CHANCELLOR.

The rule of equity in carrying agreements into a ſpecific performance is well known: (l) and the court is not obliged to decree every agreement entered into, though for valuable conſideration, in ſtrictneſs of law; it depending on the circumſtances. And undoubtedly every agreement, of which there ſhould be a ſpecific performance, ought

Specific performance of agreements: in what caſes decreed.

(l) Ante 220. 1 Brown, 396.

ought to be in writing, certain, (m) and fair in all its parts, and for adequate conſideration: and on all the circumſtances of this caſe there is not ſufficient ground to decree this; the principle argued for the plaintiff, although in general true, not being applicable to the preſent caſe. If a voluntary conveyance of an eſtate without conſideration is made for the benefit of his own family, or any one elſe, by one who is indebted at the time of the ſettlement, or ſells it afterward, it is fraudulent by the ſtatutes *Eliz.* which place it in the purchaſer for valuable conſideration againſt the volunteer. And therefore in this court, if a perſon intitled to an eſtate to himſelf and his heirs, takes a conveyance of the eſtate, ſo as to put a right in another, the court will conſider it as fraudulent; upon which kind of equity the court has gone. As if a bond, or mortgage, or conveyance of the eſtate, is taken to himſelf and his wife, making her joint purchaſer, obligee, or grantee, ſo as to intitle her to ſurvivorſhip if he dies in her life; yet that ſhall be conſidered as a mere voluntary act with reſpect to creditors, and fraudulent: although as between the wife and the heir or executor it ſhall prevail, becauſe his gift is ſufficient to exclude them: and if it reſted ſingly on that, I ſhould think it would be ſo here. But that muſt be in a caſe where the huſband, as a purchaſer for a conſideration moving from himſelf, is to pay the price for the eſtate, and no conſideration of bounty ariſing from a third perſon, inducing him to make the conveyance in that manner. And here the uncle, from whom the eſtate moved, not caring for the management of the eſtate, intended to make a conveyance for the benefit of his nephew, and as a bounty to him and his family, and to go in that manner: nor was the conſideration adequate between the uncle and nephew; upon which if the uncle had inſiſted on a bill brought by the defendant for a performance, the court would not have decreed it: therefore not to be conſidered as a truſtee.

Conveyance fraudulent within the ſtatutes of *Elizabeth.*

Next as to the plaintiff's agreement, I am of opinion, that it is not under ſuch circumſtances, as that the court ought to decree a performance againſt the defendant; for the conſideration appears inadequate, though unſkilfully put

(m) 2 Veſ. 52. Eſtate ſold for a ſum of money and an annuity, as the agreement was fair, a ſpecific performance was decreed, though the party died before any payment of the annuity. 1 Brown, 156. where there was a concealment on the part of vendor, a ſpecific performance denied. 1 Brown, 440. Agreements not to be ſet aſide but upon broad grounds. 2 Brown, 17.

put in iſſue: but it would be a very nice rule to go by, that becauſe only the annual value is put in iſſue, the groſs value ſhould not be examined to: yet if the plaintiff inſiſts upon trying the value, I will not preclude him from it; but then he ſhall pay the coſts on the diſmiſſing this bill: otherwiſe not.

Upon the whole, it is too hard to decree the defendant to make a ſurrender of this copyhold eſtate for ſo inadequate a conſideration.

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Burleigh *verſus* Pearſon, *July* 12, 1749.

Caſe 144.

Power of appointment by a father, not well executed.

HERCULES BURLEIGH, previous to his marriage, by a deed of truſt declared the uſes of a copyhold eſtate belonging to his wife; reciting, that to make a proviſion for the maintenance and preferment of ſuch younger children which they ſhould leave unmarried, and unadvanced or otherwiſe provided for, at their deaths; and for raiſing ſuch ſums as they think requiſite for the fortunes and preferments of ſuch younger children, the truſtees ſhould raiſe 1000*l.* to pay the ſame to ſuch younger children in ſuch manner and proportion as they ſhould appoint by writing; and in default of appointment by both, then to the ſaid younger children or ſome of them, as the ſurvivor ſhould appoint by writing or will: in default of appointment, equally to be divided among them

The huſband ſurviving, and being 80 years old, and having the plaintiff and four younger children, makes an appointment by will; giving 50*l.* to be paid for *Finlay*, who had married one daughter, in ſatisfaction of a bond of 50*l.* which he owed, and for which the elder ſon was joined in ſecurity: 125*l.* to *Campbel*, who had married another daughter: the remaining 825 to his ſon *John*; to the other ſon *Henry*, nothing.

In ſupport of this execution of the power it was argued for *John*, that it was in the power of the parties to make an unequal appointment, even ſo as to give it all to one, as appeared from the words; which diſcretionary power a court of equity will not take away, unleſs on the foot of injuſtice by making a bad uſe of it; which inequality could not be ſaid to be: *Auſten* v. *Auſten*, by Lord *Talbot*. Caſ. Tal. 74.

For

For the other three younger children it was argued, that the power was not completely executed: the defects therein could not be ſupplied in this court: and it ſhould be ſet aſide. In the caſe of *Shadwell his Lordſhip* held, that this court would not ſupply any defect to ſupport inequality: wherever diſcretion is abuſed, the court will interpoſe; as where colluſion, or an illuſory ſhare is given to one; although not for inequality alone whether left to diſcretion; citing alſo *Menſey* v. *Walker* by Lord *Talbot*.

LORD CHANCELLOR.

The deed, by which this truſt is created, is certainly very inaccurately penned, but a reaſonable conſtruction muſt be made: and that from the intent of the parties (282) fully declared in the beginning of the deed which is the leading clauſe; and therefore other doubtful words, if any, ought to be controuled and conſtrued by that plain declaration of the intent, which was to make a proviſion for thoſe younger children, who ſhould be left unmarried, *&c.* to which deſcription the word *ſuch* is plainly relative. *And*, after *unmarried*, muſt be conſtrued *or:* and the negative muſt run through the whole, otherwiſe it is abſurd; for they certainly meant *unprovided for*; and then a child though married, if not advanced or otherwiſe provided for, would be the object of the power: and in this ſenſe he has uſed it in his will. Then *ſuch*, refers to the deſcription before, the governing clauſe through the whole, and does not mean a general power to appoint to one or two; for all muſt have ſome. The contrary conſtruction would overturn the intent; impowering to give the whole to a child even provided for, and to leave the reſt unprovided. But the moſt doubtful part, and moſt in favour of *John*, is from the words *or ſome:* but it would be ſtrange to conſtrue this deed, ſo as to leave greater power to diſinherit in the ſurvivor, than was given jointly; eſpecially if the huſband ſurvived, as happened, when it was the wife's eſtate. The addition of *ſome*, muſt mean ſome of thoſe under the qualifications before deſcribed, in the ſame manner as *ſuch*. Another inaccuracy occurs afterward, in caſe of no appointment; for it muſt not be conſtrued to be divided among all, as well provided for as not; but means the ſaid younger children, *viz.* unprovided. Then the execution of this power muſt fall to the ground; *Henry* having nothing; and Mrs. *Finlay* but 5*cl.* to pay a debt of her huſband in exoneration of the elder ſon; not being given for her benefit, although by poſſibi-

lity

lity the diſcharging her huſband's debts might tend thereto; for it might be otherwiſe: but a father having ſuch a power cannot, unleſs he has a power to annex a condition, reſtrain a child's ſhare to the payment of a particular debt; for there may be a defence to that debt. Not that I ſay, the court might not hold the execution good, and the condition void; but to what purpoſe, when it would be contrary to the intent of the power? According to which, this cannot take effect; therefore it is void in the whole, and this 1000*l.* muſt be equally divided.

Johnſon *verſus* Mills, *July* 17, 1749. Caſe 145.

Upon a future demand out of aſſets the executor will be obliged to ſet apart the fund.

——*MILLS*, having abſconded, wrote letters to his creditors, aſſigning to them his right to 2000*l.* which would be due to him in right of his wife, after the death of his mother-in-law Mrs. *D'la Creuſe*, who had an intereſt for life in the fund, out of which it was to come, and was executrix of her huſband the covenantor in the articles.

The creditors of *Mills* bringing this bill to have the 2000*l.* ſecured for their benefit, and ſet apart during her life, as a fund for their payment after her death; ſhe oppoſes it, as having a right not to have it taken out of her hands, ſo as not to have power over it; for that the court never decreed a fund to be ſet apart for a debt, which was not to be paid by the contract itſelf till a future time, unleſs where danger of loſs or inſolvency; for then legatees might be intitled to ſuch an equity before the time of payment on the foundation of juſtice; and that the fund liable might not be waſted. But a difference ariſes between the caſe of a legacy and a demand by contract; for by giving a legacy the teſtator himſelf creates a ſpecific lien on his aſſets: whereas to affect her during her life would be a departure from the articles, unleſs ſhe was intended to be a mere truſtee: nor could the plaintiffs come againſt the original debtor or contractor during his life, and therefore not againſt his repreſentative.

LORD CHANCELLOR.

I thought nothing was better ſettled, than what is now endeavoured to be made a queſtion: that wherever a demand was made out of aſſets, certainly due but payable at a future time, the perſon intitled thereto might come

come againſt the executor, to have it ſecured for his benefit, and ſet apart in the mean time, that he might not be obliged to purſue theſe aſſets through ſeveral hands. Nor is there any more uſeful part of the juriſdiction of this court in the adminiſtration of aſſets: therefore it is admitted to be done in the caſe of a legacy always, although contingent and payable at a future day, ſo as that it might fall into the bulk of the eſtate: and this is done to ſecure the intereſt of every party of courſe as a common equity, without expecting any ſuggeſtion of inſolvency of the executor, or of waſting the aſſets. Nor is there any ground for the diſtinction taken between a legacy and a demand by contract: if any, it is rather ſtronger in the later caſe, than that of a voluntary legacy. But in no caſe can you come againſt the original perſon, which would be for this court to decree a better ſecurity, you having truſted to that riſk during his life. But the court diſtinguiſhes between the caſe of the original debtor and repreſentatives; for in the former the truſt is in the perſon, which is liable; in the latter the aſſets are liable, which this court will purſue farther than at law into whatſoever hands; conſidering it as the fund, although no ſpecific lien. Againſt an executor the action is in the *detinet* only; the wrong ariſing from his detaining the aſſets, which are the fund for ſatisfaction: againſt the heir it is in the *debet* and *detinet*; he is to diſcharge himſelf by pleading no aſſets, or not beyond ſuch a ſum. *Mills* himſelf would have a right to this
(284) equity againſt her, to have this fund ſecured: then ſo will the perſons ſtanding in his place. Her two capacities are mixed in the objection made to plaintiffs; but that is miſpleading; for they are different, one in her own, the other in another's right. If the teſtator had made a ſtranger executor, who would have ſtood in his place, and had the aſſets in his hands, ſhe herſelf, or *Mills*, or thoſe in his place, if ſhe would not, might have brought a bill againſt that ſtranger, to have this ſet apart for benefit of the perſons intereſted. Then that equity will not be varied, becauſe of the perſon made executor: and if the eſtates, which are the fund, are leaſehold, the court will order ſufficient to anſwer this demand to be ſet apart, as the court would do, if they were mortgages.

Barneſly

Barneſly *verſus* Powel, *July* 18, 1749.

Caſe 146.

AFTER a very long trial by a ſpecial jury a verdict was brought in againſt the will; with an indorſement that it was grounded on forgery, and not on any defect in the execution.

Ante, 119. 5 Auguſt 1748.

Upon the equity reſerved it was argued for the plaintiff, that the trial had made an end of the queſtion as to the real eſtate; and the decree in the court of *Exchequer*, that the will was well proved from the plaintiff's conſent, ought not to ſtand in his way; for though this court cannot reverſe it, they may decree, that it ſhall not be made uſe of againſt the plaintiff; and injunctions have been granted to the *Exchequer*, where it has claſhed with this court. 1 *Ver.* 220. As to the perſonal eſtate, though this court cannot ſet aſide the *probate* of the prerogative court, it may decree the executors, who have acted ſo ill as by impoſition upon the plaintiff, to get this conſent to the admiſſion of that, which is a forgery, to be truſtees for the plaintiff; ſince by their iniquity they have prevented his getting redreſs in the *Eccleſiaſtical* court, where the *probate* is final, the time for appeal being lapſed: but ſuppoſing it not ſo, the validity of a deed, as the conſent by proxy is, cannot be tried there. In a late caſe where the defendant burned a will, in which was a legacy to the plaintiff, ſo that it could not be proved in the *Eccleſiaſtical* court (which cannot prove a will on looſe parts of the contents of it) yet on evidence of there being ſuch a will, and the defendant's deſtroying it, the court decreed the legacy to the plaintiff, as the defendant by his own iniquity had prevented the plaintiff from coming at it. So in *Thyn* v. *Thyn*; and in caſes where the party has not been deſtitute of a remedy, the court has declared deeds void for fraud; and have at the ſame time conſidered the perſons, in whom the legal eſtate veſted, as truſtees, to prevent injuſtice to thoſe, in whoſe favour the deeds were ſet aſide. In *Tucker* v. *Phips*, *July* 10, 1746, the plaintiff's bill was as legatee under a will, which, it was ſuggeſted, the defendant had unduly ſuppreſſed. The anſwer introduced another queſtion of the ſanity of the teſtator; which belonged properly to the *Eccleſiaſtical* court: yet his *Lordſhip* entered into evidence thereof; and being of opinion that the ſanity was proved, would not put the parties to a ſuit in the *Eccleſiaſtical* court, but directed immediate payment of the legacy: citing

Forgery of a will.

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there Lord *Hundſdon*'s caſe, *Hob.* 109. And ſeveral inſtances might be put, where circumſtances give this court a juriſdiction, which it had not primarily; as ſpoliation, and therefore forgery will: although in *Branſby* v. *Kerridge*, the truſt decreed by Lord *Macclesfield* was reverſed by the *Lords*, it is difficult to ſee upon what reaſons: But in *Eq. Ab.* it ſeems to be, becauſe a trial was not firſt directed. Upon the will of one *Roe*, Sir *Robert Jacob*, who, when deſired to write a will, had put himſelf in executor, was decreed a truſtee.

1 Wms. 548.

For defendant. The right to the real eſtate cannot be now diſputed; but the verdict muſt be confined to that; but as to the perſonal, neither the court or jury had any right to examine into it; nor could this court direct it. *Branſby* v. *Kerridge* ſhews, this court ought not to inquire into fraud in obtaining a will of perſonal eſtate: which, if ever it could have been done, would have been done in *Archer* v. *Moſſe*, 2 *Ver.* 8. In *Paſchal* v. *Pickering*, *May* 7, 1746, the plaintiff and Mrs *Wiſeman* (the defendant's teſtatrix) were intitled to the whole of Lady *Brumpton*'s eſtate: and the plaintiffs brought a bill, charging that there were two teſtamentary writings; in one of which Mrs. *Wiſeman* directed a note due to her from the plaintiff, to be given up to the plaintiff: by the other ſhe directed, that whatever became of a ſuit, which had been inſtituted for the perſonal eſtate, ſhe gave it all to the plaintiff; which writings the defendant had concealed and torn: and as every thing ſhould be preſumed *in odium ſpoliatoris*, the plaintiff claimed the whole, and to be relieved againſt an action upon that note. The queſtions were, whether a remedy was not proper in another court? and ſuppoſing ſo, whether this ſpoliation was a ground to proceed on? His *Lordſhip* held, that the papers were both teſtamentary in their nature, and therefore proper for the *Eccleſiaſtical* court: that as to perſonal eſtate, it was determined in *Branſby* v. *Kerridge*, that this court had no right: and that as to ſpoliation, though the court has gone a great way; yet there is no caſe where it has gone ſo far as to direct the enjoyment of perſonal eſtate on the foot of a will: that in the caſe of one *Payne*, where an interlineation appeared on producing the will, the *Lords commiſſioners* would not determine it, but gave liberty to apply to the *Eccleſiaſtical* court. So his *Lordſhip* would not relieve, but retained the bill till proof in the *Eccleſiaſtical* court of thoſe teſtamentary ſchedules. The preſent caſe would extend to that of inſanity; which in ſubſtance is *forgery*: and there

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are ſeveral inſtances, though unfortunate, where a will has been found void for inſanity as to real eſtate, and not as to perſonal; which, if it be a defect in the law, wants the remedy of the legiſlature. Application may be in this caſe to the *Eccleſiaſtical* court; which may relieve by appeal to the *delegates*, or commiſſion of *review*, or by letters of adminiſtration; for they have ſuch power, as incident to their juriſdiction, to correct their own proxies if obtained improperly, and to relieve themſelves as well as the party, from ſuch groſs impoſition: ſo as they may ſet aſide adminiſtration obtained by fraud, in concealing a will or a *probate* appearing forged. Nor is it ever too late; for no length of time can give a ſanction thereto. The plaintiff's proceeding is on an inconſiſtent foundation, that the defendants, the executors, are intitled to the perſonal eſtate by a *probate* of a will as valid, which the former part of the decree determines to be forged. But the plaintiff cannot be intitled, unleſs an inteſtacy appears; which cannot appear, till tried in the *Eccleſiaſtical* court: nay, the contrary appears as two other wills, prior to the forged one, are in the anſwer ſet forth, wherein *Powel* is made reſiduary legatee; one in 1735, all in the hand writing in the teſtator, and atteſted by him, but without witneſſes: the other an unexecuted draught, without date, which is a ſufficient teſtamentary ſchedule; the benefit of which would be taken away by ſuch an immediate decree, even from other legatees, who are not parties. No evidence appears that *Powel* colluded in forging that will; for he oppoſed it, till proved and eſtabliſhed in the prerogative court: and as a conſequence of that oppoſition was obliged to pay the coſts of that ſuit in the *Exchequer*, by an annuitant under the will. (286)

LORD CHANCELLOR.

This is a caſe of a very extraordinary nature, and ſuch as, I hope, I ſhall never ſee again. By the tranſaction and management between the parties ſomething ariſes new; as there always will, as there are ſo many ſpecies and inventions of frauds; to correct which the court muſt apply their rules and the principles of them, as far as they can.

Decree of exchequer that a will is well proved, which is afterward found forged here; this court will decree that no uſe ſhall be made thereof.

As to the real eſtate, there is very little difficulty; the will being the proper ſubject of the common law and of equity, in reſpect of the aſſiſtance which this court gives to come at the proper trial. The verdict, not complained

of by the defendants themſelves, is the ſtrongeſt foundation for the court to go, as far as it has juriſdiction: and it is admitted to be concluſive. In conſequence of which, and of my former opinion, the plaintiff muſt be relieved againſt all agreements, writings, or aſſurances, obtained by any of the defendants ſince his father's death, to be delivered up to be cancelled; as muſt alſo the poſſeſſion of the real eſtate, with an account of the rents received. As to
(287) the decree in the *Exchequer* obtained by the plaintiff's conſent, that the will was well proved, and an annuity eſtabliſhed (the effect of which is now over, as the annuitant is dead) the beſt direction is, that *Powel*, party to that ſuit and claiming under that will, be reſtrained from ſetting up that decree in reſpect of the real eſtate, or claiming any benefit thereby. As to his paying coſts thereof it was not founded on his oppoſition, but the coſts followed the juſtice of the demand by the annuitant, as it does in a ſuit for a legacy.

As to the perſonal eſtate, I left it open in the decree, that the plaintiff ſhould be intitled to relief in ſuch manner as was agreeable to equity; becauſe I ſaw, there might be litigation concerning the manner of getting that relief: whether immediately, or by leaving the plaintiff to ſue in the *eccleſiaſtical* court; both which are thereby taken in, which it would have been improper to have determined before; for if a verdict for the will, that would be out of the caſe. Undoubtedly the principle laid down for the defendant is true, that the juriſdiction of wills of perſonal eſtate belongs by the conſtitution to the *eccleſiaſtical* court; according to which law it muſt be tried, notwithſtanding the will is found forged by a jury at law by the examination of witneſſes; which is ſometimes unfortunate: cauſing different determinations, as I have known it. Nor can this court help it; but the parties muſt take their fate, if by the ſtrict rules of law it is ſo. But I will lay hold of any ground to alter that; nor give way, if I can avoid it, to run the hazard of theſe different determinations, and to try this will, ſo ſolemnly determined by examination of witneſſes *vivâ voce*, again in the *eccleſiaſtical* court upon examination by depoſition. Something of what the plaintiff inſiſts on as a method to avoid this, fell from me at the hearing: and as to the general objection thereto, of breaking in upon the juriſdiction of the *eccleſiaſtical* court, however formerly donbted, it is certainly now ſettled by the *Lords* in *Branſby* v. *Kerridge*, that this court cannot ſet aſide a will of perſonal eſtate for fraud. And though nothing

Will of perſonal eſtate examinable in *eccleſiaſtical* court; but this court will avoid, if poſſible, the ſending it there after the will has been found forged by a jury, which bound the real eſtate, and will go as far as they can to decree the parties truſtees.

thing was ſaid there of forgery, that is ſtronger: nor will I infringe on what is laid down there, and in *Powis* v. *Andrews*, and in the caſe of Mr. *Hawkins*'s will. But there is a material difference between this court's taking on them to ſet aſide a will of perſonal eſtate on account of fraud or forgery in obtaining or making that will, and taking from the party the benefit of a will eſtabliſhed in the *eccleſiaſtical* court by his fraud, not upon the teſtator, but upon the perſon diſinherited thereby, and claiming after the teſtator's death againſt it. Fraud in obtaining a will infects the whole, but the caſe of a will, of which the *probate* was obtained by fraud on the next of kin, is of another conſideration; upon which foundation this probate ſtands, being obtained from the plaintiff by fraud upon him a weak man, and ſince found to be a lunatic, by the defendant's own acts, ſubſequent to the death of the teſtator. The method of doing which was found on an agreement containing a covenant for the plaintiff's doing all acts, demanded of him by *Powel*; in conſequence of which a ſpecial proxy under hand and ſeal was obtained from him, confeſſing the allegations; upon which ſentence was pronounced of *probate* to the defendants the executors. This *probate* depends on that deed; and is any thing more proper for this court to enquire into and ſet aſide for fraud, if proved, than ſuch a deed? If a warrant of attorney to confeſs judgment was obtained from him, though I will not ſay the common law courts could not ſet it aſide; yet a bill might be brought here in caſes, where they could not. (n) This then is a ground of juriſdiction in this court diſtinct from the will itſelf. I will not take upon me to deny, that the *eccleſiaſtical* court has juriſdiction in ſome inſtances, to inquire into and correct the *mal practice* of their proctors: as if by undue practice of theirs the proxy is obtained from their client, the *eccleſiaſtical* court might inquire into, purſue, cenſure, and perhaps make the acts void: but that is a different conſideration; all the practice being between the parties intereſted, with which the proctor had nothing to do. And I am of opinion (with deference to any determination that hereafter may be) that ſuch proxy under hand and ſeal, importing a conſent to the *probate* of a will, is not in the power of the *eccleſiaſtical* court to ſet aſide; for they muſt do it by inquiring, whether that deed was obtained by fraud or impoſition, or not; which, if they did, the courts

Probate obtained by fraud relieved againſt here, and the deed importing a conſent thereto ſet aſide here, not in *eccleſiaſtical* court; and the defendant decreed to conſent to a revocation of the probate.

(n) Ante, 130.

courts of common law would prohibit them, and ſay they had no juriſdiction to determine concerning the validity of deed under hand and ſeal, which belonged to the temporal courts, whether well executed or properly obtained. In the time of *Parker Chief Juſtice*, there was a ſuit for the diſtribution of the ſurplus of perſonal eſtate, and in the *eccleſiaſtical* court it was inſiſted, there ought to be an inteſtacy *quoad hoc*, the executor having a legacy: the executor applied to *B. R.* for a prohibition, which was granted, on the foundation that the *eccleſiaſtical* court was to determine according to the rules of their law; and this was the juriſdiction of courts of equity; which does not indeed come up to the preſent, but goes ſo far as to ſhew, that the *eccleſiaſtical* court cannot determine property on the foundation of equity. This deed of proxy therefore is a diſtinct foundation to intitle this court to proceed ſome way or other concerning this *probate*, abſtracted from the general juriſdiction of the *eccleſiaſtical* court to determine of a will of perſonal eſtate. As to the abſurdity argued in allowing the *probate* to ſtand, and yet determining the will forged: there is ſome appearance for that, for allowing the *probate* muſt be on the foundation, that the will is good: but that will not conclude ſo far, as that this court ſhould not take proper methods to come at it, without ſending the parties to the *Eccleſiaſtical* court to litigate all this again. Several caſes wherein by reaſon of the ill practice of defendant, as in the caſe of ſpoliation it is admitted, a court of equity will take from them benefits, they would otherwiſe be intitled to: as to decree them truſtees, and to direct conveyances to ſet matters right: though this court cannot ſet aſide a judgment of a common law court obtained againſt conſcience, yet will it decree the party to acknowledge ſatisfaction on that judgment, though he has received nothing; becauſe obtained where nothing was due: ſo it cannot ſet aſide a fine for being obtained by fraud and impoſition, as the court of *C. B.* to a certain degree and with ſome reſtriction may: yet on a conveyance ſo obtained, this court never ſent the plaintiff to *C. B.* to ſet it aſide; but conſiders the perſon obtaining the eſtate, even by fine, as a truſtee, and decrees him to reconvey on the general ground of laying hold of the ill conſcience of the party, to make him do what is neceſſary to reſtore matters as before. Why not in the preſent caſe alſo, as far as it can be done? If it is to be ſaid, that in every caſe of a forged will proved in the *Eccleſiaſtical* court, not on proofs, but on fraud and impoſition upon the next of kin, this court is bound to ſend it to the *Eccleſiaſtical* court,

Prohibition to court *eccleſiaſtical.*

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Acknowledgment of ſatisfaction decreed here on a judgment obtained againſt conſcience.

A perſon obtaining a fine by fraud decreed a truſtee.

court, it would give a great advantage to ſuch ill practiſers, in letting them have the chance of the plaintiff's witneſſes dying before they can get through ſuch a litigation; and a great diſadvantage to the other ſide, as it is a worſe kind of proof than the examination *viva voce*, which I will prevent if I can; and am ſtrictly warranted to ſet it aſide, and to relieve the plaintiff againſt that and the deed of proxy, the foundation of the ſentence, which then ſtands without any foundation; (o) and if no more in this caſe, I would go to the utmoſt to decree the defendants truſtees.

But the laſt objection creates ſome difficulty, *viz.* the prior will found among the number of papers; like the reſt, of the teſtator's handwriting and ſigned by him; by which the whole perſonal eſtate, except ſome legacies, is given to *Powel*, but no deviſe of the real eſtate; which, if a true will, is now the laſt will; which, whether it be or not, I cannot direct an iſſue; and it is ſubject to ſeveral queſtions proper in the *Eccleſiaſtical* court, whether a perfect or complete inſtrument; which if it comes out to be a will, it would be a contradiction thereto now to decree the defendants to be truſtees.

The method occurring to me is, like decreeing conſent by counſel to a motion in *C. B.* to ſet aſide a judgment next term, to decree (upon the principle of laying hold of the evil conſcience of the parties, and the juriſdiction I have over theſe deeds) the defendants to conſent in the *Eccleſiaſtical* court next term to a revocation of that *probate*; which will be then ſet aſide and out of the caſe; and things will be in their proper ſtate, without interfering with any juriſdiction: but as to going farther, and granting adminiſtration to the plaintiff *de novo*, this prior will (290)
muſt be firſt ſet out of the caſe: therefore the defendant *Powel* ſhall have a fortnight's time after ſuch revocation, to propound and exhibit that paper writing in the *Eccleſiaſtical* court, and to proſecute it with effect, which if he does not, I will decree both defendants to conſent to the granting adminiſtration to the plaintiff.

And then I think I ought to go farther: and although I ſhall not yet decree a truſt, yet even now ſhall be warranted to decree an account of the perſonal eſtate, to be paid into the bank, for the benefit of the parties intitled; which

(o) Strange 666. Gilb. 203.

which for ſecurity was done in *Powis* v. *Andrews:* and the preſent caſe from all the ill practice that has been, is ſtronger than that. This is the better method, to avoid any jealouſy of infringing on the *Eccleſiaſtical* court.

Coſts. The plaintiff is intitled to coſts in law and equity againſt both defendants; for in ſuch a ſcene of iniquity and combination, though one more guilty than another, the court never diſtinguiſhes, but charges all together.

It being then inſiſted for the plaintiff, that the court ought to direct no examination of the ſaid paper writing, but grant a perpetual injunction, from the circumſtances of its being produced and found with the forged will, and its reciting a forged deed:

Lord Chancellor thought, this would be a very good defence in the *Eccleſiaſtical* court, as they were circumſtances of ſuſpicion: but that it would be going too far to ſay, that becauſe of ill practice in one will, he ſhould have no right as to another.

Caſe 147. Lomax *verſus* Holmden, *July* 22, 1749.

Deviſe in truſt to his ſon *Caleb* for life, remainder to the firſt, &c. ſon of his body lawfully begotten in tail. *Caleb* had no ſon at making the will, but had one afterward, who died in life of teſtator, and afterward another, who ſhall take as firſt ſon.

THIS came before the court on the petition of *Caleb Lomax*, (p) to have the deeds and writings relating to the real eſtate delivered up to him: which depended on the queſtion, whether he had an eſtate of inheritance, or for life only, under the will of his grandfather *Joſhua*, made *December* 9, 1720? *Joſhua* had then but one ſon *Caleb*, who had diſobliged him, and four daughters, and a grandſon by a deceaſed daughter: he deviſed his real eſtate to *Graves Norton* on truſt to permit his wife to receive and take the rents and profits during life, without impeachment of waſte; ſhe paying thereout 200*l. per Ann.* by eight equal payments to his ſon *Caleb*; and after her death to permit his four daughters and grandſon, their heirs and aſſigns, to receive the rents and profits to their own uſe, till his ſon *Caleb* ſhould attain forty years of age, hoping then he would become ſenſible of his folly: and then to the uſe of *Caleb* for life, without impeachment of waſte: then on truſt to ſupport contingent remainders: and after his deceaſe, to the uſe of the firſt ſon of the body of

(p) 3 Pr. Wms. 179. 3 Burr 1570.

of *Caleb* lawfully begotten, and the heirs of the body of ſuch firſt ſon: and for want of ſuch iſſue, to ſecond, third, and fourth, lawfully begotten ſucceſſively in remainder one after another; and for want of ſuch iſſue, to the uſe of his four daughters and grand-ſon, their heirs and aſſigns for ever, as tenants in common, not as joint-tenants, chargeable nevertheleſs with 8000*l.* to the daughters of *Caleb*, equally to be divided among them.

Caleb had married about two months before the date of the will: he had a ſon born afterward, who died ſoon, and in the life of teſtator; afterward he had another ſon, the preſent plaintiff.

For whom it was argued, that the intention was not to give it over to the daughters, but on failure of the ſons and their iſſue; which gives them an eſtate-tail. There is no reaſon to diſtinguiſh the ſecond, third, and fourth ſon from the firſt; *Caleb* not then having any child who could be the particular object of the teſtator; whoſe view was to make a ſtrict ſettlement of his eſtate in his family; and ſuch a ſtrange proviſion as a ſucceſſive ſeries of eſtates for life was never heard of in a family-ſettlement. It is drawn by the teſtator himſelf; and wherever he intended an eſtate for life, he has ſhewn, he knew how to expreſs it properly. *Langley* v. *Baldwin*, (cited in 1 *Wms.* 59) ſhews an expreſs eſtate may be altered by implication; and the words here warrant the court to infer ſuch an intention; nor is there any rule of law or authority againſt it; for all the caſes prove, that no want of words is fatal, if from the whole the intent can be collected to the ſatisfaction of the court; no artificial form of words being required to expreſs it. So that the teſtator having omitted words, upon which to graft the limitation of heirs of the body after the limitation to ſecond, third, and fourth, it may be ſupplied, as it may be abridged or enlarged according to the intent from the whole context; which governs the whole, as *Swin.* ſays, who puts a caſe, where the word *executor* is ſupplied, the teſtator having only ſaid "I make my wife my of this will." There are ſeveral caſes ſtronger than the preſent, where the whole context prevails againſt expreſs words; and the ſtronger, as being old caſes, when the courts went by the ſtricteſt rules, having ſince uſed greater latitude to anſwer the intent, which has been made good, even where there were no words of gift. Wherever an eſtate is given over for want of iſſue, it is an eſtate-tail; and applying it either to want of iſſue of the ſecond, third,

third, and fourth ſon, or to *Caleb* the father, either way will give an eſtate-tail; for the plaintiff may take a remainder in tail by implication as heir of the body of his
(292) father. Inſtead of repeating the limitation in tail given to the firſt ſon, the teſtator affected a kind of brevity; as appears from his omitting the article *the* before ſecond, third, and fourth; but he deſigned the ſame. He could not intend to leave the male-iſſue of *Caleb* unprovided for, and yet leave a proviſion for the daughters: nor is this going farther than was done in *Langley* v. *Baldwin*, to preſerve the intereſt of a ſeventh ſon; although the plaintiff is not the firſt born ſon, he is to be conſidered as the firſt ſon, capable of taking at the time the will ſpeaks; which is from the death of the teſtator with reſpect to the deviſee; although as to the capacity of the teſtator to diſpoſe, and the ſubject matter of the deviſe, it is from the making the will. He ſpeaks only as to thoſe who ſhall ſurvive him; and by the death of the elder brother, he was out of the caſe, as if never in being; which was the ground of Lord *Talbot*'s determination in *Hopkins* v. *Hopkins*. That *firſt born* is ſynonymous with, and means, *eldeſt*, appears from the caſe of the *Dutchy of Cornwall*, printed by itſelf in 1613; where it was held, that *Henry*, the firſt born of King *James* I. being dead, *Charles* the II. born, might take that dutchy as *primogenitus*, which agrees with *Selden*, *part* 2. 778.

Caſ. Tal. 44.

Againſt which it was inſiſted, the queſtion was merely legal; ariſing on a veſted uſe, not on articles, or any thing executory; therefore not to receive a different determination from what it would receive in courts of law. Firſt, whether he can take an eſtate-tail under the deſcription of *firſt ſon?* The intent is indeed the guide; but ſtill it is limited within the words of the will, and muſt appear from them: and it would be a contradiction to the words to ſay, the plaintiff is the firſt born, when he is admitted not to have been ſo. And though there is a difference between grants and wills, as no technical form of words are required in the latter, yet ſtill ſome words proper to carry the limitation beyond an eſtate for life muſt be uſed, or the court will not raiſe it by conſtruction. There muſt be words in the will to ſupport the intent; and the words of *Powel J.* in *Sal.* 227, againſt enlarging the expoſition of wills are material. *Firſt* and *ſecond* are here mentioned in priority of birth; and not like the caſe of portions, where *elder* has been conſidered as *younger*, *&c.* The *Prince*'s caſe is a ſettlement made by act of parliament for

for particular purpoſes, and in nature of a peerage: ſo that the conſtruction is different from common caſes. *Firſt born ſon* is a good name of purchaſe, becauſe always certain; and then the ſecond cannot be him: to help this it is ſaid, wills ſpeak from the death of teſtator; but that ſubſequent accident could not have been the view; nor has he uſed words to that purpoſe. In general, wills ſpeak from the making; ſo that lands purchaſed afterward paſs not thereby. In *Hopkins* v. *Hopkins* the time of making alone was held to be material as to the conſtruction of the teſtator's meaning: though as to the manner of taking, whether by an executory deviſe, of contingent remainder, it ſpoke according to the accidents at the time of the death. If the firſt ſon had ſurvived the teſtator, the plaintiff could not have taken as the firſt: and if the firſt ſon here had left iſſue, though according to *Bret* v. *Rigden*, *Plow.* that iſſue could not take, becauſe the father could not; the plaintiff would then have taken as ſecond ſon, and then he could not at the ſame time take as firſt and ſecond. *Trafford* v. *Aſhton*, 2 *Ver.* 660, proves, that *ſecond ſon* is taken in the common acceptation, unleſs the contrary ſhewn: next whether he can take an eſtate-tail, from the words and the intent? The words do not give it, therefore if at all, it muſt be by implication, which according to *Vau.* muſt be a neceſſary implication, and not ſo here; for a life eſtate will anſwer. *Iſſue* means *ſons*; is a word of purchaſe and deſcription merely; and then cannot operate by limitation alſo: nor can they take one after another, or in a courſe of ſucceſſion, if they or *Caleb* take an eſtate in tail. Nor will the court ſupply a defect of words in the preſent caſe. (293)

Lord Chancellor having taken time to conſider it, now delivered his opinion.

There are two points to be attended to: firſt, whether the plaintiff can take an eſtate-tail, as the perſon deſigned and deſcribed by the name of the firſt ſon of the body of *Caleb*, lawfully begotten? For if ſo, there are clear words to that purpoſe. The ſecond, if he cannot, whether he can take an eſtate-tail by the remainder to the ſecond ſon, upon conſtruction of all the parts of the will taken together? which lays the third point, whether he might not take a remainder in tail by implication as heir of the body of his father, out of the caſe?

On

On the firſt point I am of opinion, the plaintiff may well take an eſtate-tail. I admit it is no truſt; and therefore a queſtion of law, and to be determined by the ſame manner and rules as at law upon an ejectment, if it had been, or could be brought. But ſtill it is a queſtion of a will; and the conſtruction I make, is warranted by the intent of the teſtator, and the legal expoſition of the words. The intent is beſt collected from the circumſtances: and it appears, he intended to confine his reſentment to *Caleb*, and not to diſinherit his iſſue, who could not have offended him. Which view, however imperfectly expreſſed, appears from the whole tenor; eſpecially from his charging the remainder to his daughters, with 8000*l.* to the daughters of *Caleb*; for it is not to be conceived, that he would not have made ſome proviſion for the ſons, if he had not ſuppoſed, he had done it before: whereas by the other conſtruction, in default of heirs-male of the body of the firſt ſon, all the others were to be but tenants for life; and
(294) their ſons to have nothing; to prevent which, there is no way but by conſtruing the grandſons tenants in tail, if conſiſtent with the rule of law.

Then as to the words; for whatever the intention, if there are not words in the will to warrant it, either expreſſed or implied, it cannot have effect.

The firſt objection to the plaintiff's being included in the deſcription of *firſt ſon of the body of Caleb* is, that *firſt* is the ſame with *primogenitus*, which the plaintiff is not, being in fact the ſecond born. A ſecond objection is, that though the plaintiff was eldeſt at death of the teſtator, that is not ſufficient; for the will muſt be taken to ſpeak as at the making. A third objection is, that if *primogenitus* may be applied to the ſecond, yet it cannot in this will; becauſe the expreſs limitation to the ſecond ſon is put in oppoſition to the firſt; and the ſame perſon cannot be conſidered as both.

Where a remainder limited to firſt ſon may be taken by a ſecond under that deſcription.

As to the firſt objection, I cannot quite agree, that *firſt ſon* is to be always taken ſtrictly in the ſenſe of *primogenitus*; but in the ſenſe of an elder ſon, *ſenior* or *maximus natu*. For ſuppoſe a ſettlement by act executed in the life of grantor, limits the eſtate of *A.* with contingent remainder to his firſt ſon; *A.* had a ſon, who died without *iſſue* before the making that ſettlement: yet a ſecond ſon born afterwards might take the remainder by that deſcription: nor would the intent be conſidered to have been to limit it

to

to a perſon dead at the time of making. Had the words been *to be begotten*, that would clearly have deſcribed an after-born ſon; and it is admitted, thoſe are the ſame with *begotten*. But ſuppoſing it ſtrictly the ſame as *primogenitus*, yet might the ſecond properly come within that deſcription; for which purpoſe the caſe of *the Dutchy of Cornwall* is direct; that the eldeſt ſon of the King of *England* (and therefore *Richard* II. required a ſpecial grant) takes it as *primogenitus:* although Lord *Coke*, at the end of the *Prince*'s caſe, 8 *Co.* ſays otherwiſe. But that was not the point there, being only an obſervation of his own, and has ever ſince been held a miſtake of that great man. He was alſo miſtaken in the fact, in ſaying that *Henry* VIII. was not Duke of *Cornwall*, becauſe not *primogenitus*; for Lord *Bacon* in his hiſtory of *Henry* VII. affirms the contrary, that the dukedom devolved to him upon the death of *Arthur:* and this is by a great lawyer, and who muſt have looked into it, as he was then *Attorney* or *Solicitor General*. So was *Edward* VI. in his father's life, without a new creation, although the king's ſecond ſon. Lord *Elleſmere* in his printed obſervations upon Lord *Coke* ſays, with ſome warmth, that Lord *Coke* ſplit on this rock, in reſtraining it to *primogenitus*, and not to the firſt *pro tempore*, voluntarily, without any occaſion, or the concurrence of any judge. *Selden* in his *Titles of Honour*, 6 *vol.* 776 ſays, the eldeſt ſons living are alſo Dukes of *Cornwall*; and that Prince *Charles* was Duke on the death of his brother, appears from the records, *Rym. Fœd. tom.* 16, 792, he is ſo deſcribed in the patent creating him *Prince of Wales*. There is no act of parliament afterward, in the time of *James* I. creating him Duke: nor can any doubt ariſe (as I at firſt thought) of his right thereto under the charter of 11 *Edward* III. from the act of *James* I. enabling him to leaſe part of the *Dutchy* lands; ſeveral acts being paſſed to enable the dukes for the time being ſo to do. Nor is it a ſatisfactory anſwer, that that caſe was founded on an act of parliament made on political views, and ſo different from the rules of common law; for the difference of that caſe from others, is in the nature and form of the limitation of the kind of eſtates to be taken in the *Dutchy*, not in the perſons to take. But I own, I ſhould not be quite ſatisfied to found my opinion upon this, for political reaſons might have ſome weight. But this determination happens to be ſtrictly agreeable to the rules of law, in caſes of common perſons: as appears from *Fitzherbert*'s *Nat. Brev.* 188, on the writ *de auxilio ad filium militem faciendum:* where he ſays, that *primogenitus* then alive is ſufficient,

(295)

cient, which is agreeable to Lord *Elleſmere*'s obſervation; that *Charles* became *primogenitus* on the death of his brother without iſſue, which circumſtance concurs here; for iſſue are conſidered as part of their father. This is an original writ; where the phraſe and language of the law is moſt critical and preciſe, and has been always conſtrued with great ſtrictneſs; and as it ſupports the intention of the teſtator, it is ſome ſatisfaction to find it warranted by the moſt reſpected authority, as that is. I have been furniſhed with the original caſe of the *Dutchy* printed in 1613, which is very ſcarce, where it appears to have been by the greateſt men, with full aſſent of council, and the reaſons of the reſolution at large; and *Fitzherbert*'s *Nat. Brev.* is expreſsly mentioned and relied on there.

Wills in general conſtrued from the making; unleſs circumſtances or the tenor of it ſhews it ſhould be from death of teſtator; but the intermediate time not regarded.

As to the ſecond objection, it muſt be admitted, the general rule in the conſtruing wills is, (q) that the time of making, not of the death of the teſtator, is to be regarded. *Swin. Part* 7. *Chap.* 11. who goes farther; his method being firſt to lay down the rule, then the extenſion, then the limitations thereon: and he inſtances in the caſe of a legacy, to the children of a perſon, who at the making the will had but four, and afterward ſeveral others: if no more in the caſe, the four are to have it among them; which though true in general, yet ſeveral caſes occur, where according to the circumſtances and tenor of the whole, it ſhall go among all the children at his death: which limitation holds ſtrongly here; for it is impoſſible the teſtator ſhould mean *primogenitus* in being at the making the will, as he had none then: therefore he muſt mean a ſon born *in futuro*, and then it is abſurd, and not to be
(296) preſumed, he meant a ſon born afterward, who ſhould die in his life. The making and the death, not the intermediate time, only to be regarded in conſtruing wills. If the teſtator could not mean the time of making, he muſt mean the time of his death, when the inſtrument would be complete. *Hopkins* v. *Hopkins* in 1734, went rather farther than this; for there the deviſee, upon whoſe death without iſſue-male a contingent remainder was given to the next ſon, was alive and named by the teſtator at the making of the will; which the teſtator had before his eyes, and that he might ſurvive the teſtator, and take the eſtate intended him; yet becauſe he was not alive at the death of the teſtator, the court referred the conſtruction of the will to

(q) A will ſpeaks at different time for different purpoſes, to many purpoſes from the date, to others from teſtator's death, per Lord Mansfield. Durnf. and Eaſt. 438, note.

to that time, turned it into an executory deviſe, and let the profits of the eſtate deſcend in mean time to the heir at law; which was not only a deviation from the technical form of the deviſe, but an alteration in ſubſtance, carrying the meſne profits in a different channel from what was intended.

The third objection is anſwered, by what I ſaid before; for if it is to be taken, as a deſcription of *firſt ſon who ſhould be in being at his death*, the ſuppoſed repugnancy is taken away. But the caſe in *Fitzherbert's Nat. Brev.* proves, there is no repugnancy; for the ſame perſon may be *primogenitus* and *ſecundus filius*, and may be deſcribed either way: though he is in the order of nature *ſecundus*, yet taking the term *firſt begotten* relative to any particular time, as here at the death of the teſtator, he is *primogenitus*.

On the ſecond point I incline to think, the plaintiff might by that limitation take an eſtate tail: at leaſt a great deal may be, and has been ſaid, reaſonable to maintain it: from the omiſſion of the article *the*, and the ſhort phraſes uſed by the teſtator; and from the latitude which may not unnaturally be taken in expounding the word *(ſucceſſively) ſecundum ſubjectam materiam*, as that word is capable of a larger meaning, eſpecially when applied to an eſtate in a family, and eſpecially from the ſubſequent words in the limitation to the daughters upon the death without iſſue; for they muſt be referred to the iſſue of ſome perſon. Nor has the teſtator ſaid in words, whoſe ſon the ſecond, third, and fourth, ſhould be: nor for want of whoſe iſſue the limitation over; which ſhould be therefore ſupplied. But as I am of opinion, the plaintiff is tenant in tail on the firſt point, ſo that the deeds and writings muſt be delivered to him, it is unneceſſary to give any on that: and I chuſe to avoid it, as it would be entering into a large field, and as it is more prudent for judges to avoid the making deciſions upon nice refined diſtinctions.

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Sewell *verſus* Bridge, *July* 24, 1749. Caſe 148.

PLEA, that pending ſuit the parties came to compoſition; the general objection to which was, that becauſe there was no particular account by *items*, it ought not to ſtand.

Where an account not ſet aſide or opened on new diſcovery.

LORD

LORD CHANCELLOR.

The objection to this plea is upon a principle I can never admit; for the conſequence would be to ſay, that a long, ſtale and various tranſaction could not be put an end to without a minute account, which would create endleſs ſuits: nor has a ſubſequent diſcovery ſet aſide or opened ſuch accounts; as was denied to be done by Lord *King*: if indeed it had been a minute ſtrict account entered into, it might be otherwiſe upon new diſcovery.

Caſe 149. Taylor *verſus* Beech, *July* 24, 1749.

Plea of ſtatute of frauds to diſcovery of a parol agreement not allowed where part performance.

PREVIOUS to the defendant's marriage, 500*l.* the property of the (r) wife by a former marriage, was agreed to be aſſigned to truſtees for her ſeparate uſe during coverture; and to be applied after her death, to ſuch uſes as ſhe ſhould appoint; and for want of appointment, to her executors and adminiſtrators: to carry which agreement into execution, they ſent to an agent to prepare the writing; but he being then out of the way, they were married before the agent (s) could carry it finally into execution. A proper draught of an aſſignment was afterwards prepared; in which alterations were made by the huſband's own hand-writing, who on delivering it to the wife told her he had made no other alteration, than was for her benefit; and ſuffered her to receive it to her ſeparate uſe during coverture.

The wife by will gave the 500*l.* to the plaintiffs, who brought this bill for it.

The defendant pleaded the ſtatute of frauds on foundation of the agreement not being reduced into writing, as a good bar to the diſcovery of any parol agreement, as well as to the relief; averring that neither he, nor any one for him, upon or previous to the marriage, reduced it into writing.

LORD CHANCELLOR.

There is no colour for this plea; which is informal: *upon or previous to* is no denial; for it is a good agreement, if

(r) Ante, 83, Supra. 441. Prec. Ch. 526. 1 Wms. 618. Strange 236.
(s) In 1 Atk. 12, ſuch a plea allowed, as no part of the agreement was performed.

if afterward ſigned by him. Although the ſtatute of frauds is a protection againſt the defendant's making a diſcovery of a parol agreement, and therefore it may be pleaded as well to the diſcovery as relief, yet that rule extends not to facts ſubſequent, *viz.* ſhewing a part performance; in which the ſtatute cannot be pleaded. Although it is true, that in the caſe of marriage agreements it is otherwiſe: though it is not mere marriage occaſions that, without ſomething elſe. But here are ſtrong circumſtances ſubſequent to the agreement, which go a great way to take it out of the ſtatute: and if the ſtatute is ſuffered to be pleaded to the diſcovery even of a parol agreement in ſuch a caſe, it would be very miſchievous. Let the plea therefore be overruled; but without prejudice to the defendant's inſiſting on the ſtatute in anſwer.

But Lord *Chancellor* afterward ordered that clauſe *without prejudice, &c.* to be ſtruck out: ſaying he did not know, that it had been ſo directed upon a plea of the ſtatute of frauds; although it had on a plea of the ſtatute of limitations.

Ex Parte Otto Lewis, *Auguſt* 2, 1749.

Caſe 150.

PETITION, grounded on the ſtatute 4 *G.* 2. *c.* 10. that a lunatic heir of a mortgagee might be directed to convey to the mortgagor.

One found *non compos* before the ſenate of *Hamburgh*, a mortgagee within *ſt.* 4. *G.* 2. *c.* 10. and will be directed to convey.

As no commiſſion of lunacy was taken out, Lord *Chancellor* was in doubt whether in general he could make ſuch order, the words of the act being that "all perſons being lunatic, or the committee of ſuch perſons, ſhall convey." But in this caſe there having been a proceeding before a proper juriſdiction, the ſenate of *Hamburgh*, where he reſided, upon which he was found *non compos*, and a curator or guardian appointed for him and his affairs, which proceeding the court was obliged to take notice of, he declared, he was a mortgagee within the act, and ordered, that on payment of the mortgage money there ſhould be a conveyance to the mortgagor. *Ex Relatione.*

Caſe 151. Hearle *verſus* Greenbank, *Auguſt* 3, 1749.

Infancy.

Power.

Coverture.

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(t) THIS cauſe came before the court on two bills: the original by the plaintiffs as deviſees and reſiduary legatees of *Mary Winſmore*, wife of *William Winſmore*, a bankrupt, to have an appointment made by her of a real eſtate, deviſed to her by her father Doctor *Worth*, eſtabliſhed; and that the executors might account with the plaintiffs for all the real and perſonal eſtate of Doctor *Worth*, after raiſing 8000*l.* and other legacies, bequeathed by the will of *Mary Winſmore*: and that *Mary Winſmore* the infant might convey the freehold, copyhold, and leaſehold eſtate to them.

A. deviſes in truſt for ſole and ſeparate uſe of his daughter (a feme covert) for life, and to be at her own diſpoſal, with power notwithſtanding coverture to diſpoſe thereof. She when 19, in purſuance of her power, diſpoſes of it by will: this not a good execution of the power as to the real eſtate, which may be claimed by the heir at law, although at the ſame time claiming a legacy; nor is the huſband intitled to be tenant by curteſy.

The croſs bill was brought by the aſſignees, under the commiſſion of bankruptcy againſt *William Winſmore*, that they, as ſtanding in his place, might have the benefit of every thing, which *Mary Winſmore* was intitled to, as belonging to her huſband, and to have an account of the freehold, copyhold and leaſehold eſtate of Doctor *Worth*, and of the real and perſonal eſtate of *Dorothy Price*; and that if the legal intereſt of the leaſehold eſtate remained in any of the parties, they ſhould convey it to the aſſignees.

Doctor *Worth* had an only daughter about ſixteen or ſeventeen years of age. *William Winſmore in December* 1739, married her clandeſtinely, without the conſent of her father, who was offended with her: but, as ſhe was young, was more offended with the huſband, who made her believe he was a man of fortune; and in like manner impoſed on her father, and got from him about 1400*l.* which *Mary* was intitled to from her aunt *Dorothy Price*. Within three month after the marriage, a commiſſion of bankruptcy iſſued againſt the huſband; and in *June* 1741 *Mary* the infant was born.

Auguſt 1742, Doctor *Worth* made his will, and died; thereby giving ſome legacies and charities, he deviſed all his freehold, copyhold, and real eſtate whatſoever, and whereſoever, and all his leaſehold eſtate, to two truſtees, their heirs, executors, adminiſtrators and aſſigns in truſt, to apply the reſidue, after paying their own charges, to the ſole and proper uſe of his daughter *Mary Winſmore* during her life, and to be at her diſpoſal, and not ſubject to

(t) 1 Brown, 147.

to the debts or controul of her huſband; her receipts to be good; and to permit her by deed or writing, executed in preſence of three or more witneſſes, notwithſtanding her coverture, to give and diſpoſe of all his freehold, copyhold and leaſehold eſtate, as ſhe ſhall think fit; ſhe having a particular regard to his poor relations in *Cornwal*; and gave to the ſame truſtees, whom he made joint executors, his perſonal eſtate in truſt for the ſole and ſeparate uſe of *Mary Winſmore*, and to be at her diſpoſal, and not ſubject to the debts or controul of her huſband.

October 1742 *Mary Winſmore* then under the age of 21, though above 17, after the huſband's bankruptcy, and living ſeparate from him, made her will; and thereby, in purſuance of her power in her father's will, gave to her daughter *Mary* 100*l. per ann.* till ſhe attain the age of ten, and after that 150*l. per ann.* till twenty-one: theſe ſums to be applied for her maintenance and education, and gave her 8000*l.* to be paid her when ſhe attains twenty-one; but if ſhe died before twenty-one without iſſue of her body living at her death, ſhe gave the 8000*l.* to two other perſons, *viz. Hearle*, one of the plaintiffs in the original cauſe, and *Henry Worth*, to be paid within ten months after the deceaſe of her daughter: ſhe then gave legacies to ſome poor relations; appointing the two truſtees in her father's will, and two others joint executors, guardians and truſtees to her daughter: then deviſed the reſidue of her real and perſonal eſtate to the plaintiffs, the two *Hearles*, their heirs, executors and adminiſtrators for ever, as tenants in common, not as joint-tenants, charged as aforeſaid. (300)

Mary Winſmore had four kinds of eſtates; firſt, a leaſehold, originally of ninety years under a church leaſe, to which ſhe was clearly intitled under her father's marriage-ſettlement; but the term expired; and when it was to be renewed by the Dean and Chapter of *Worceſter*, it was made a leaſe for three lives: next a perſonal eſtate, coming to her from her aunt *Price*; and ſome copyholds which were admitted to be conſidered by the cuſtom of the manor as chattel intereſts: thirdly, the perſonal eſtate of her father: fourthly, his real eſtate.

For the infant daughter. Wherever the inability of infancy prevents the alienation of land by virtue of owner-ſhip, it prevents an indirect alienation by a power; becauſe, it is a natural inability, from want of diſcretion. Before the ſtatute of uſes, all theſe powers were merely

uſes; and where a perſon could not alien the eſtate at law, he could not alien the uſe in equity, which followed the law: ſo that if he could not do it by feoffment, he could not convey the uſe of it: but where by cuſtom he could ſooner paſs it, that incapacity determines ſooner, and he might ſooner diſpoſe of the uſe. This court never eſtabliſhes general rules contrary to the rules of the common or ſtatute law; and before the ſtatute of uſes, never ſuffered an infant to paſs the uſe, where he could not do it by law. By the ſtatute of uſes, theſe powers got into the common law, and are moulded in it; the firſt power was by the ſtatute of *H.* 8. to tenant in tail to make leaſes, which would bind the remainder man and iſſue in tail. That ſtatute does not ſay *tenant in tail of full age*; and yet there is no doubt, whether tenant in tail within age under that ſtatute could execute that power of making leaſes. Then the ſtatute of wills, giving power to every perſon having land to deviſe, does not ſay every perſon of full age; but the law operates on that power given, and ſays, no perſon diſabled ſhall deviſe: therefore no perſon under twenty-one can; it being conſidered as the ſame as the inability of a perſon *non compos.* In *Sid.* 162 it is held, that an infant making a will, living after twenty-one, and not revoking, it was not a good will, nor to be read as evidence to a jury. In moſt families the ſettlements are as ſtrict as the law will admit, and a power given to every tenant for life to make leaſes or jointures: and in none of theſe caſes was it ever
(301) held, that an infant could under that power make a good one: and this happening every day and never done, is a good argument, that it cannot be done: according to *Co. Lit.* this is to be diſtinguiſhed from the caſe of making a valid jointure by a power from agreements of infants in conſideration of marriage; which the court will, becauſe reciprocal, carry into execution, or at leaſt let the party refuſing have no benefit of it. Several acts of parliament have been purpoſely made to enable infants to make jointures; and yet in none of theſe ſettlements is the ability of age expreſſed, but implied. It is a poſitive rule of law, that till twenty-one he ſhall be to this purpoſe as of a month old only: ſo that ſuch a power to an infant would not be good though by expreſs words: although the law to ſome purpoſes diſtinguiſhes his age, which might be from the *Eccleſiaſtical* law; it never having been implied in the powers given by ſtatute or ſettlement; if it can be, there muſt be very ſtrong words for it. And conſidering the circumſtances of the daughter at the time, and that this is only a power out of the ownerſhip, the father, ſuppoſing he could

give

give that power to the infant over his eſtate, could never intend it: his only view was to make her a feme ſole; it being all in oppoſition to her huſband. There is a diſtinction between the inability of a feme covert, and of infancy; which is natural inability; not ſo of the other. If ſhe, being a lunatic had done it, that would be void; ſo of infancy: this will cannot be read in evidence to a jury, who muſt return *no deviſe*; then this court cannot make it good. But then ſuppoſing the will void: whether the plaintiffs who claim the real eſtate ſubject to the legacies, are not intitled to put the defendant the infant to her election, whether ſhe will claim the legacy of 8000*l.* or the lands by deſcent; upon the rule of not diſputing a will in any part, under which you claim? That rule is true, properly underſtood, *viz.* that wherever a perſon claims under a will, and by the ſame will (properly executed) land or any thing elſe is deviſed to another, which the teſtator had not a title to, the perſon claiming under the will ſhall not diſpute that title; the will manifeſting his intent how the whole ſhould go: but that rule does not go to make good no will; which is the preſent caſe, and not of a will impeached for want of title in the teſtator; this being like a deviſe to a charitable uſe, ſince the ſtatute, for a want of capacity in the teſtator, is not want of title. Another queſtion is, with the aſſignees of the huſband; that his wife being ſeized in fee, and he having a child by her, is intitled to be tenant by *curteſy*, and that they ſtand in his place: there may indeed be tenant by *curteſy* of a truſt: and in *Caſburn* v. *Engliſh*, his lordſhip determined a tenancy by *curteſy* of money, to be laid out in land: but that will not affect the preſent caſe; for as it is a direction of the truſt of an eſtate, the rule of law is to be followed. Where the legal eſtate executed, would make the huſband tenant by *courteſy*, he ſhall be ſo: but the court will not do it, wherever the intent of the declaration of truſt is, that the huſband's right to be tenant by *courteſy* ſhall be excluded; becauſe if the truſtees were to execute it, they muſt exclude his right according to the intent; which here is, that he ſhould have no intereſt in it. There are two ſtrong caſes for this, *Sands* v. *Dixwel*, where from the intent of the parties to exclude tenancy by *curteſy*, his *Lordſhip* turned words of limitation into words of purchaſe, to preſerve the intent: But *Bennet* v. *Davis*, 2 *Wms.* 316, is ſtill ſtronger. Another queſtion is, as to the intereſt of the 8000*l.* which being a gift to a child, ſhe is intitled to intereſt even before the time of payment: and as to the perſonal

ſonal eſtate of the aunt, the aſſignees cannot come at it in equity, without making a proviſion for the child.

For plaintiffs. As to the intereſt of the 8000*l.* a particular maintenance being given, not out of the intereſt of the 8000*l.* but being a general gift out of the bulk of the eſtate, it takes off the preſumption, that in the mean time intereſt ſhall go for benefit of the infant, for whoſe benefit there is no occaſion to preſume, it was intended to accumulate, becauſe the time is poſtponed with regard to the circumſtances of the infant, to whom it is given; not for the repreſentatives, who could not be in view: the perſons regarded were the plaintiffs, to whom all the reſidue is given. As to the deviſing the eſtate itſelf, it depends on two queſtions: whether it was the intent of the teſtator, that ſhe ſhould have this power during her infancy? And if he intended, and ſo expreſſed it, whether in law or equity it can have effect? The circumſtances at making the will are certainly proper to be conſidered; and the teſtator had a point in view, which could not be anſwered but by giving her power to receive the profits immediately after his death, and then it muſt be to diſpoſe of it alſo; the point in view being to keep every thing out of the huſband's power; nor is there any thing to prevent this intent from taking place. An infant may preſent to a church; may do this, as well as declare the uſes of a fine and recovery; and may by cuſtom at a certain age make a conveyance, and the law will ingraft on ſuch cuſtom, and carry it farther: as appears from Lord *Buckhurſt*'s caſe, *Moor* 512, who puts the caſe of an infant's having power to make a feoffment by cuſtom, and making a feoffment to the uſes of his will; that, though void as a will, becauſe of his infancy, ſhall ſerve as a declaration of the uſes of the feoffment; which is not to be diſtinguiſhed from the preſent caſe. If indeed this does not operate by way of execution of a power, but as diſpoſing of her intereſt, it would not be good: but it operates by the power, as ſhe recited it; and the rule of law is, that where there are two ways of doing the ſame thing, if it cannot by one, it ſhall by the other. Sir *Edward Clere*'s caſe, 6 *Co.* 17 *b.* determined in *Rich* v. *Beaumont*, in the *Houſe of Lords*, that a feme covert may execute ſuch a power. Then why may not an infant of the age of diſcretion? The diſability of an infant is not a natural diſability, becauſe it is by a poſitive law; and then the ſame rule of juſtice affecting one poſitive diſability will affect another: and the diſability of a feme covert is ſtronger than that of infancy; for an action upon a bond ſhe may plead *non eſt factum*; an infant muſt plead

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infancy,

infancy, & ſic non eſt factum. If it is aſked, at what age an infant may do this? The anſwer is, whenever he is capaple of doing it. In this caſe no doubt or nicety; the infant being above nineteen; having as much diſcretion as if ſhe had lived two years longer; and this court will judge of the perſonal diſcretion of the infant. But one *non compos* cannot execute any power, as to act as an attorney, *&c.* becauſe he has no mind. Where an infant acts in *auter droit*, he is capable of acting, not hurting himſelf; it being the fault of the party truſting him; ſo that an infant executor may ſell under a power by the will. But if this execution, and ſo the will, is bad, yet have the plaintiffs a ground in equity, that the eſtate ſhall go according to the will, from the defendant's claim of a legacy of 8000*l.* under the will; as in *Noys* v. *Mordaunt*. The 8000*l.* cannot be claimed but under that will; which cannot indeed be read as to the giving the eſtate itſelf, ſuppoſing it does not paſs thereby; but, as to the intent of the condition of performing the other part, it may be read. As to the tenancy by *curteſy*, the plaintiffs are thereby affected, and there is no ground for it, as to that there muſt be a ſeiſin in poſſeſſion.

The cauſe was heard laſt *May*; and involving ſeveral material points, Lord *Chancellor* took time to conſider of it, and now delivered his opinion.

As to the firſt kind of eſtate which *Mary Winſmore* had, being a freehold leaſe, her huſband might be intitled thereto during her life; but upon her death it came to her daughter as ſpecial occupant: ſo that the huſband is not intitled to be tenant by *curteſy* of it; and the aſſignees cannot claim it: nor can the power on Doctor *Worth*'s will affect it, being taken as a purchaſe. So that is to be laid out of the caſe, as neither the plaintiffs in the original or croſs cauſe can claim it.

As to the perſonal eſtate of her father: it is given to her ſeparate uſe; in which caſe it is a rule of the court, (u) that a feme covert may diſpoſe of it: and this is clear of the objection made as to the real eſtate; becauſe ſhe was above the age of ſeventeen, at which age, if ſole, ſhe might make a will. Nay the books ſay, if above fourteen, the will is therefore a good appointment of the perſonal.

Infant at ſeventeen may deviſe perſonal eſtate.

Feme covert may diſpoſe of her ſeparate eſtate.

But

(u) She being conſidered a feme ſole as to that, Poſt 518. 2 Vol. 190, 75.

But as to the real eſtate, the principal queſtion is, whether her will is a good execution of the power in her father's will? And upon this there are three queſtions. Firſt, (304) whether the power is well executed? Secondly, whether the plaintiffs who claim the real eſtate ſubject to the legacies, are not intitled to put the infant to her election: and if ſhe will take the 8000*l.* whether ſhe will be admitted in equity to contradict and defeat her mother's will as to the real eſtate? Thirdly, whether the bankrupt is intitled to be tenant by *curteſy?*

A power given generally cannot be executed by infant.

What powers infant may execute.

The firſt is a conſiderable queſtion, and never determined, that I know of. I can find no caſe, where a power given generally can be executed by an infant: and therefore I will make none. As to the general queſtion concerning powers, it muſt be admitted there are ſome kind of powers an infant may execute: as where he is a mere inſtrument or conduit pipe, where no prudence or diſcretion is required, or where his right is not affected. 1 *Inſt.* 52. *A.* "Few perſons are diſabled to be private attornies to deliver ſeiſin; for monks, infants, feme coverts, *&c.* may be attornies." As this opinion of Lord *Coke* is delivered it ſeems at firſt, as if he meant only to deliver ſeiſin; which is merely a miniſterial act: although the latter words are general. Yet he himſelf, 1 *Inſt.* 128. *A.* ſays, that an infant cannot be attorney: it is therefore pretty much undetermined, how far infants can be attornies, unleſs to deliver ſeiſin or ſuch a miniſterial act. But that is different from theſe kind of powers.

Powers over real eſtates, introduced by *St. of uſes.*

Theſe powers over real eſtates were introduced by the ſtatute of uſes; for before that they were done by way of condition; and as before the ſtatute a man might execute a power over an uſe, ſo he may ſtill. At common law an infant might have performed a condition; that is a condition for his benefit: ſo he might make a feoffment for his benefit: as if he had an eſtate on condition to make a feoffment of part of it to *J. S.* or elſe to loſe the whole eſtate. But, as to the other kind of powers to be executed by infants, I find no authority for it. An infant may undoubtedly preſent to a church, but he cannot execute this power in like manner. He may preſent by guardian, if only a month old; and the ſtrong ground of that is, there is no inconvenience; becauſe the biſhop is to judge of the clerk's ability. The inſtances of fine and recovery are to be laid out of the caſe; the law allowing of infants declaring the uſes thereon for want of remedy; for in the caſe of an infant's fine, during nonage, if *error* brought, and to be tried by inſpection, it may

may be reverſed; but if not reverſed, the fine ſtands. And if the fine ſtands, the declaration of the uſes is the ſame conveyance, and therefore that will ſtand; for on matter of record he is taken to be a perſon of full age, and none muſt be admitted to aver the contrary. No argument can be drawn from cuſtom, cuſtom differing from private powers given in general: cuſtom is *Lex Loci*, and is always preſumed to have a reaſonable commencement: and ſuch a cuſtom, that an infant at fifteen may make a feoffment, is the ſame, as if a private act of parliament was made to give infants ſuch a power. The caſe put by *Moor* has a ſemblance to the execution of a power; but was put only *arguendo* at the bar; he cited no caſe for it: nor can I find any authority to ſupport it; the caſes being rather to the contrary. 21 *E.* 4. 24. *B. Bro. Cuſtom Pl.* 50. 2. *Rol. Ab.* 779, that if an infant makes a feoffment of *Gavelkind* land warranted by the cuſtom, and it is to his own uſe, if he makes a will of the uſe, it is void; unleſs the cuſtom will warrant it, the deviſe is not good, for the cuſtom muſt be taken ſtrictly. And in my apprehenſion this differs little from the caſe put by *Moor*; for before the ſtatute of uſes, one might deviſe the uſe, and the will would be a good direction of the uſe. If ſo that one, who has a feoffment to his own uſe, might deviſe, yet according to the caſe in *Rol. Ab.* the uſe there could not be deviſed by will: which is a direct contradiction to the caſe put by *Moor*, *arguendo*; and therefore I take that caſe not to be law. It is ſaid, that a feme covert may execute a power; (which was ſo determined in *Rich* v. *Beaumont* upon the execution of a power, created before ſhe was covert: and ſo in a caſe before Lord *King*) ſo a power to a *feme covert* to make leaſes is good; and therefore why not this by an infant of the age of diſcretion? I take it in law, (x) that the diſability of an infant with reſpect to the real eſtate is more favoured and a ſtronger diſability, than that of *feme coverts.* In *Hob.* 95, there are ſome caſes put: and there is a marginal note very material. And here I will take notice, that the notes in *Hob.* are allowed to be his own. The note is this, "coverture was not at common law ſo far protected as infancy, and ſome other diſabilities, as *non ſane memory*, *&c.*" the ground of the diſability being not from want of judgment, but from being under the power of her huſband; ſhe having as much judgment as if diſcovert: this is the reaſon why ſhe is examined upon ſuffering a recovery.

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Infancy a ſtronger diſability than coverture.

(x) Money to be laid out in land by a private act of parliament, an infant cannot elect to take it as money. 2 Brown, 56.

covery. But no examination of an infant to make his recovery good; (y) his disability arising from want of judgment. I will mention some other cases. 1 *Inst.* 246, 403, that a woman disseisee marries; disseisor dies seised: that shall take away her entry after her husband's death, unless she was within age at the time of the marriage; for then no folly can be accounted in her in taking such husband, as would not enter before the descent. This shews, that the disability of an infant arises from want of judgment: in 10 *Co.* 43 *A. Mary Portington*'s case, a common recovery against husband and wife is good; but not against an infant, who has not such a disposing power of the land as they have, but is *tout ousterment* disabled by law, to convey or transfer his inheritance or freehold during minority: be she is said here to be of as much discretion, as if she had lived two years longer; and that the court will judge of the infant's personal discretion. This would be introductive of the utmost inconvenience, and a power with which I should be very sorry to be trusted. There is a variety of opinions of people's ability and judgment; and in these cases it cannot be known till after the death of the party. The words of *Hob.* 225 are material, of a feoffment by an infant by custom, that in pleading, an age certain must be set down, and not left to the measuring a yard of cloth, *&c.* These general cases determine me in my opinion, that this cannot be good. Private acts of parliament have been made to enable infants to execute powers: as in Sir *Thomas Parkin*'s case. I have searched, and the only case I can find, of a power executed by an infant is Lord *Kilmurry* v. D. *Gery* (generally cited for another purpose) which is cited and more particularly stated in *Evelyn* v. *Evelyn*, 2 *Wms.* 659. I have sent for the decree; and it does look there, as if it was a power executed by an infant; but it was by virtue of a private act of parliament: I sent for that act of parliament and there is an express clause to make good all acts to be done by him, relating to the settlement by that act; which should notwithstanding his minority be as valid and effectual, as if at the time of making he was of full age. So that this is clearly a power arising from an act of parliament, and no colour of an authority for a general power. Taking it therefore in general, I am of opinion, an infant cannot execute a power. But next it must be considered, whether

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(y) Infants bound if conusant of their right. 2 Vol. 212. Infant bound by a fair and reasonable marriage settlement, but the covenants are not to be construed too strictly. 1 Brown, 152.

ther any thing in this caſe is particularly to this purpoſe? and I think, there is. Firſt upon the penning of the power: ſecondly, as it is a power coupled with an intereſt and upon the penning there is a ſtrong objection againſt her executing it during infancy; for the teſtator, having the coverture in view, has excluded that, giving her power to diſpoſe, notwithſtanding that; and would alſo have excluded the caſe of infancy, had he ſo intended: and then the rule is, *expreſſio unius excluſio alterius*. He might not think there was any occaſion for giving her power during infancy, as ſhe was then about nineteen; his plain view being to ſecure it from the huſband's power, and that he might not induce or cajole her to part with it. Secondly, this is a power coupled with intereſt, and which is always conſidered different from naked powers. It was admitted, that if this execution was to operate on the eſtate of the infant, it might not be good; (z) now it is clearly ſo, for ſhe had the truſt in equity for life, with the truſt of the inheritance in her in the mean time; which would remain in herſelf, if not diſpoſed of, and deſcend to her daughter: ſo that this is directly a power over her own inheritance, which cannot be executed by an infant.

Power coupled with an intereſt, different from a naked power.

As to the equity of the plaintiffs from the claim of the 8000*l.* legacy: it is true it was determined in *Noys* v. *Mordaunt*, 2 *Ver.* 581. that if lands in fee are given to one child, and to another lands intailed, it is meant, they ſhould releaſe to each other: and the court has gone farther ſince, to the caſe of a perſonal legacy. But ſtill I am of opinion, this differs from all thoſe caſes; and the infant is not obliged to make her election; for here the will is void. And when the obligation ariſes from the inſufficiency of the execution or invalidity of the will, there is no caſe, where the le legatee is obliged to make an election; for here is no will of the land. A man deviſes a legacy out of land to his heir at law; and the land to another: the will is not well executed according to the ſtatute of *frauds* for the real eſtate: the court would not oblige the heir at law, upon accepting the legacy, to give up the land. This differs from *Noys* v. *Mordaunt* in the reaſon of the thing; there the teſtator deviſed ſome lands, which were, and others which were not his own: and the court ſaid, that the deviſe ſhould ſuffer the lands to paſs, as if they were his own: but here, whether the lands were her own or not, they cannot paſs by the will. Another

A will void as to land: heir at law may notwithſtanding claim a legacy.

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diſtinction

(z) Naked powers conſtrued ſtrictly, powers coupled with an intereſt liberally. 2 Vol. 79.

diſtinction is, Lord *Keeper* there grounded his opinion upon the father's diſpoſing his eſtate among his children; whereas here ſhe had but one child, and diſpoſes of her whole real eſtate charged with legacies to the plaintiffs.

There muſt be a ſeiſin in law or equity to intitle huſband to be tenant by curteſy.

As to the claim by the aſſignees of the rents and profits during the bankrupt's life, (a) I am of opinion, he is not intitled to be tenant by *curteſy*, upon the ground of the huſband's having no ſeiſin in law or equity. By the father's will the whole legal inheritance was veſted in the truſtees, and though ſaid to be determined in *Caſburn* v. *Engliſh*, that huſband may be tenant by *courteſy* of a truſt in equity; yet firſt the wife muſt have the inheritance: ſecondly, there muſt be a ſeiſin of the freehold during the coverture. That the wife had the inheritance is true, and there was a kind of ſeiſin; that is an equity; a truſt of the profits for her life: but here the father, whoſe eſtate it was, has made his daughter a *feme ſole*, giving her the profits during her life; but not ſubject to the controul of her huſband. Then what ſeiſin had the huſband in equity during the coverture? and this is eſſential to a tenancy by *curteſy*, and would be directly contrary to the intent of the teſtator.

Intereſt.

Where the court will, or will not, give intereſt for legacy before payable.

But as to the intereſt of the 8000*l.* I am of opinion, the infant daughter is not intitled thereto till twenty-one. The general rule is, that a legacy payable at a certain time does not carry intereſt, till the time of payment comes; for intereſt is given for delay of payment. If intereſt is given in mean time, the repreſentative of the legatee ſhall recover the legacy immediately; but if not, the repreſentatives ſhall not recover it, till the time when by computation the infant might have attained his age. The ground I go upon is, that in the caſes, where the court has given intereſt in the mean time, it has been, where intereſt has been intended by way of maintenance. Here the teſtatrix has made another proviſion for the legatee's maintenance, and not to ariſe out of the intereſt; for then the argument would be ſtronger, that the legacy was intended to carry intereſt in the mean time: but it is given out of the general fund. Another thing is the contingency; which ſhews it was in her view, that ſhe might die before twenty-one. There are indeed ſeveral caſes, where the court has given intereſt; as in *Acherly* v. *Vernon*; but there were particular reaſons for it.

Next

(a) Ante. 176.

Next as to the aunt's perſonal eſtate a queſtion has been ſtarted, whether, if the aſſignees are intitled thereto, (the huſband gaining a matrimonial right, which ſurvives to him, and cannot be affected by the power or appointment,) they can claim it in equity, without being obliged to make a proviſion for the daughter? In *Jewſon* v. *Moulſon*, *Mich.* 16. *G.* 2. I was of opinion, that the aſſignees have been compellable to make a ſettlement for a wife, where the huſband had made none. But I can find no caſe, where it has been done for a child: I do not ſay it cannot, but there are reaſons here, why it ſhould not. It is a liberal diſcretion, which the court exerciſes in the caſe of a wife; and in this caſe the child is provided for, ſo that the court ought not to make this the firſt inſtance; for ſhe is intitled to the real eſtate, and to 8000*l.* out of the perſonal; which is a great proviſion; and the court will not make a ſtretch in equity in the caſe of a child thus provided for; and on the other hand fair creditors. But the 1400*l.* paid by the Doctor to the bankrupt, muſt be conſidered as paid out of the perſonal eſtate of the aunt.

Beckford *verſus* Tobin, *November* 4, 1749. Caſe 152.

SIR *James Tobin* having an eſtate in South Sea and Eaſt-India ſtock, leaſehold, and ſome ſhares in ſhips, by his will gave 4000*l.* to two truſtees, to be paid and applied in ſuch manner as he ſhould, by writing under hand and ſeal order and direct; making them and two other perſons executors. Intereſt of a legacy.

Afterward by a codicil he directs the truſtees to apply the 4000*l.* to the uſes of a boy called *Michael*, aged five years, and then living with *John Tobin*; and his maintenance and education to be paid out of the intereſt of that 4000*l.*

This was an appeal from a decree in 1739.

For the appellant. Intereſt for this legacy ſhould commence from the death of the teſtator; and as to the rate, in general, where it is out of perſonal eſtate, it ſtands as a debt on the eſtate; and therefore is a debt which will bear the legal courſe of intereſt, as even a voluntary bond will. So a contract for any ſum with intereſt, means

means legal intereſt, and here the word intereſt is mentioned. In ſeveral caſes his *Lordſhip* has determined, that a general legacy, without mention of intereſt or any time, (309) ſhould bear five *per cent.* and it is the conſtant rule where out of perſonal eſtate; unleſs an intent ſhewn to carry leſs than the legal intereſt: but not ſo where out of land, as no real eſtate, commonly ſpeaking, produces more than four. This is the whole proviſion for an infant: and by one obliged by nature to provide for him, as his illegitimate ſon. The teſtator has given intereſt, and the court will conſtrue it legal intereſt; which takes it out of the diſcretion of the court, as much as if the teſtator had given legal intereſt. No lacheſs can be imputed, as he was an infant at the time of the decree.

For the reſiduary legatee. There is no direction in the will to pay the intereſt from the death of the teſtator, nor any thing to take it out of the common caſe of a legacy's not being payable till one year after; the preſumption in favour of a legitimate child not holding in the caſe of one who is a mere ſtranger having a legacy. The time of making the will in 1732 is material; for from thence to the time of the decree no more than four could be got: till the exigency of the government upon the war with *Spain* raiſed the value of money; and then the court, where out of perſonal eſtate, gave five; becauſe the value of money was five in government ſecurities. There are alſo particular circumſtances to diſtinguiſh this legacy, and to give but four *per cent.* although five ſhould be given for the other legacies in the will. The truſtees actually have the money in their own hands; if then they do not place it out, as they ought, the court will make them pay that intereſt, which could have been got, if placed out: beyond which they cannot be charged. The court does not ſupply in favour of natural children by the ſame rules as for legitimate children; ſuch as the defect of ſurrender, and the mother's covenant to ſtand ſeiſed to the uſe of her natural child is void; there being no blood. It cannot be reduced to a certain rule here, what intereſt ſhall be given for a legacy, no more than at law what damages a jury ſhall give: wherever the thing exceeds the demand for it, the price is lowered. So in money as well as other commodities. Exigencies will vary the rate of intereſt; and there are ſeveral caſes where four has been given, though out of a perſonal fund. The beſt rule to go by is, what intereſt could in general be got at that time

time: and there was no fund then, upon which five could be got. Land or government ſecurities were the only two things, upon which the truſtees could fairly lay it out: unleſs perhaps by ſmall ſums to tradeſmen; upon which if any failure, the court would make them ſuffer. The infant only acquieſced under an order without complaining that he had a lower rate of intereſt than he ought.

LORD CHANCELLOR. (310)

As to the firſt queſtion, I am of opinion, that in this particular caſe there ought to be intereſt from the death (b) of the teſtator, and not only from the end of one year after. * The rule is true, that the intereſt of a general legacy, for which no time is appointed, is from the end of one year; which is ſtrengthened by the ſtatute of diſtribution giving one year in the caſe of inteſtacy to diſtribute; the ſame reaſon holding where there is a will and executors: yet that rule was not founded upon that ſtatute; being a rule of this court before; who took it from the *eccleſiaſtical* court, which gave the executor a year to get in the eſtate, and pay the legacy, before he ſhould be compelled to give an account, *&c.* And as this court has a concurrent juriſdiction in the caſe of legacies, it has followed that rule, that there might be no variance in the rule of juſtice, and allowed that time of a year, where no certain time was mentioned. Yet there are exceptions thereto; one of which is the caſe of a legacy by a father or mother to a legitimate child, whether by way of portion or not. If it is given generally, the court will give intereſt from the death to create a proviſion for its maintenance; and if payable at a certain age, and the child not otherwiſe provided for, the court will give intereſt in the mean time before that age. But the court has not extended this to a natural child for two reaſons: firſt from the rule of law conſidering a natural child as no relation; having indeed no civil blood. Secondly, that it is not fit for a court of juſtice to give the ſame countenance to ſuch children as in the caſe of legitimate children: and to diſcountenance

Where intereſt is to commence from the death of teſtator, and not from the end of a year after.

(b) Legacy payable within a year, Legatee had no notice of the legacy, 'till the executor publiſhed it in the Gazette, no intereſt ſhall be paid. Pre. Chan 11.

* This is the rule if the legacy is out of the perſonalty, unleſs the time of payment is mentioned, but if out of the realty it carries intereſt from teſtator's death, as the land yields profits. 2 Wms. 26. 2 Atk. 108. Intereſt from a year after teſtator's death, if ſpecific from the death. 2 Vol. 563.

countenance practices of that kind, the court has taken them to be out of all ſuch proviſions, as the ſupplying defect of ſurrender for them, *&c.* But the ground of the preſent caſe is from the words of the will and codicil: although nothing particular can be inferred from the penning of that clauſe in the will, unleſs as it takes in the act he did afterward: otherwiſe there is no pretence that it ſhould carry intereſt before the end of the year. But in the conſtruction of the legacy, the court muſt take in the codicil, which muſt make part of, and have the ſame effect as if it had been in the will; and then it amounts to a legacy in truſt: the truſt explains the intent, governs and directs every thing relative, and conſequently the time of payment. As where the truſt imports a fee, it ſhall be ſo conſtrued; although the words of the deviſe would not carry it. Then conſider what direction this codicil leaves as to the time of payment. No particular time for the commencement of the maintenance and education; which muſt be meant continuing throughout; and during that whole time, the 4000*l.* muſt carry ſome intereſt. The court has ſaid, that intereſt ſhall follow the principal, as the ſhadow the body, and that in the caſe of collateral relations: as in *Vernon* v. *Acherly*, it carried intereſt before the time of payment came; although the teſ-
(311) tator directed payment at the time of marriage: and great ſtreſs was laid on a caſe in Lord *Nottingham*'s time, where there was an indication of ſeparating it from the bulk of the eſtate: but there is ſomething deciſive here; that unleſs the court makes this conſtruction, this child, if he died within the year, would have no maintenance: then no one could expend any thing thereout for him, and whoever had maintained him would have loſt his money.

Where the court will give leſs than the legal intereſt for a legacy charged on perſonal eſtate; as where the fund did not produce ſo much, and an intention to ſeparate the bulk of the eſtate.

As to the next queſtion; in general the court exerciſes as large diſcretion as to the rate of intereſt upon legacies, where intereſt is not particularly given, as in any caſe; and difficult to reduce it to a certain rule. I do not know, that, where the teſtator has ſaid intereſt, the court has held itſelf ſo bound, as inſiſted upon for the appellant, to give the legal intereſt: but ſuppoſing for argument ſake it is ſo: the teſtator has taken for granted, the 4000*l.* will carry intereſt. It is to be conſidered as taken out of the bulk of the eſtate, to be placed out by the truſtees, in whoſe hands the codicil has conſidered it diſtinct from the other two executors. There cannot be a ſtronger implication, than that his intent was ſuch, and their duty was to have placed it at intereſt as ſoon as poſſible, and thereout his maintenance

nance was to come; which was his view: and no direction of that kind mentioned ſo as to confine the court to legal intereſt. Then what diſcretion is to be uſed? The general rule has been between intereſt of legacies charged on land, and on perſonal eſtate; and where nothing more, the court has ſaid, that land never produces profit equal to the intereſt of money, and will follow the courſe of things and give intereſt, where charged on land, one *per cent.* lower than the legal intereſt. So it was when the legal intereſt was at ſix; but in general where a legacy is out of perſonal eſtate, the court gives five, and unleſs that is taken to be a ſort of rule, there will be no diſtinction between them. I agree, that notwithſtanding this, after the great fall of the value of money and rate of intereſt, in many caſes, where the court was to give intereſt by diſcretion, four only were given, when upon perſonal eſtate, as I believe, Sir *Joſeph Jekyl* did: yet the court laid hold on ſome particular reaſon (although perhaps not in every caſe,) generally on ſome inquiry upon what kind of fund or ſecurity the teſtator's eſtate is placed out: and in ſome caſes ſent it to the *maſter* to inquire, and, where they found it did not produce more than four, directed but four; there being then no certain rule, I will not vary this decree, as to the rate of intereſt. It is true the appellant was an infant at the time of the decree, and not precluded by the order made; yet his making no complaint is a kind of waiver. It now comes before me on the general report of the *maſter*; and it appears, on what kind of funds the eſtate ſtood out; which, I believe, computing round, did not make quite four; the dividends on the ſhares of ſhips being merely contingent. But there is another reaſon for not varying the decree, from the intention of ſeparating this from the bulk; which if the truſtees had then done, and placed out, it could not have produced more than four, which is a good rule to go by. (312)

But as to the time of commencment, the decree ſhould be varied.

Caſe 135. Lacam *verſus* Mertins, *November* 8, 1749.

Marſhalling aſſets, by letting ſimple contract creditor come in place of a ſpecialty creditor, can only be where the ſpecialty creditor had a remedy againſt the real and perſonal aſſets of the debtor deceaſed whoſe aſſets are in queſtion.

(c) MRS. *Hay* in the life of her huſband levied a fine of her eſtate, making it ſubject to a debt of 2000*l.* which had been contracted by her huſband. After his death ſhe borrows a further ſum of 400*l.* and by an indorſement agrees, her eſtate ſo pledged ſhould ſtand pledged with this 400*l.* and not to be redeemed without payment of all theſe ſums.

The queſtion now was, after the *maſter*'s report, how far ſimple contract contractors were intitled to come upon her real eſtate, in the place of ſpecialty creditors?

LORD CHANCELLOR.

(d) The rule of the court, as to marſhalling aſſets, and directing ſimple contract creditors, to ſtand in the place of ſpecialty creditors *pro tanto* to receive ſatisfaction, is a very juſt and beneficial rule, and ought to be adhered to; and the court leans and endeavours to bring creditors within that rule, and extends it, that all the creditors may receive ſatisfaction. Yet it muſt be as between the real and perſonal aſſets of a perſon deceaſed; for the court has no right to marſhal the aſſets of a perſon alive; it not being ſubject to ſuch a juriſdiction of equity till the death. Nor can the court extend this relief to creditors further than the nature of the contract will ſupport it; therefore it muſt be a ſpecialty creditor of the perſon, whoſe aſſets are in queſtion; (e) ſuch as might have remedy againſt both real and perſonal, or either, of the debtor deceaſed: it not being every ſpecialty creditor, in whoſe place the ſimple contract creditors can come to affect the real aſſets, *viz.* where the ſpecialty creditor himſelf cannot affect the aſſets, as where the heirs are not bound; and ſuch it is here; heirs not being bound in the covenant.

Now to apply theſe general rules to the debts in queſtion: for ſuch debts, upon which there might be remedy againſt her

(c) Ante, 52, 251.

(d) The general rule is that where one claimant has more than one fund to reſort to, and another has only one, the firſt ſhall reſort to that fund on which the ſecond has no lien. 2 Atk. 246.

(e) 2 Brown, 107. 1 Wms. 347. 2 Wms. 664.

her in her life, or againſt her repreſentative after her death, the ſimple contract creditors are intitled to receive ſatisfaction *pro tanto*; and therefore for the 400*l.* as being a ſpecialty debt upon her own bond after the huſband's death, ſatisfied out of her perſonal aſſets: but not as to the 2000*l.* which there is no ground to make her perſonal debt, or any debt of her's. It was originally her huſband's; (f) nor could ſhe then make herſelf liable by contract. There is no covenant for her payment of the money; nor is there ſuch a covenant, upon which any remedy could be againſt her perſonal eſtate, unleſs ſhe had been guilty of a breach; all the covenant being, that the eſtate ſhould ſtand charged. This covenantee therefore could not have brought an action or other remedy againſt her or her repreſentative, becauſe no breach. Then there is no body, in whoſe place to come *pro tanto*; and this is a caſe, for which the court never would ſtrain, however liberal they are in ſuch caſes in the conſtruction for creditors; for it is material in this caſe, that it is the huſband's debt; and the intent was not to change the nature of it, and to make it her debt, for it is only recited in the deed; and the recital of a debt under hand and ſeal, has been held to be no ſpecialty debt, although recited in a deed; for it muſt ſtand on its own force; and ſo I have known it determined by Sir *Joſeph Jekyl*. (313)

Recital of a debt in a deed under hand and ſeal, no ſpecialty deed.

Beard *verſus* Travers, *November* 9, 1749. Caſe 154.

ON petition relating to the appointing a guardian to Miſs *Herbert*.

LORD CHANCELLOR.

Any one, as *Amicus Curiæ* may make application for and in the behalf of an infant, though no relation; as is often done.

In caſes relating to clandeſtine marriages hearſay evidence and declarations are no defective proof: but has weight with the court; eſpecially when uncontradicted by any thing on the other ſide.

In the preſent caſe ſuch order ſhall be made, as was made in *Barry* v. *Smith*, and in Lord *Raymond*'s caſe by Lord *Talbot*;

(f) But ſhe might charge her own eſtate, 2 Atk. 384. 1 Wms. 264.

Talbot; that this lady be not married without leave of the court; and that neither Lord *M*———, or his ſon, have any acceſs to her by letter or otherwiſe.

(314)

Caſe 155. Johnſon *verſus* Smith, *November* 10, 1749.

Joſeph Johnſon by deed poll aſſigns all his ſecurities to a natural daughter, but afterwards treats them as his own, not having delivered the deed to her; he afterwards executes and delivers to her a bond for 10000*l.* payable in three months after his death; and deviſes to her his real eſtate provided ſhe marries *A.* and deviſes all his perſonal eſtate to her, making her executrix. She refuſes to marry *A.* and ſhall not have both the benefit of the deed and the bond, but has an election.

(g) *JOSEPH JOHNSON* having only a natural daughter, who lived with him, and whom he maintained and educated, expreſſing great love and affection for her; in 1736, having then a real eſtate (the annual value of which did not appear) and alſo a perſonal eſtate, conſiſting in ſecurities chiefly, to the value of 7000*l.* in conſideration of love, good will, and affection, executed an aſſignment, or (as it was commonly called) deed of gift to her, then of the age of nineteen, of all his mortgages, bonds, bills, and other ſums he had at intereſt, to hold to her, her heirs, executors, and ſo forth, from thenceforth to her and their proper uſe for ever; "as I have abſolutely, and of my own accord, ſet and put in further teſtimony."

He afterward treated theſe ſecurities as continuing his own; changing ſeveral, calling in, and placing out on new ſecurities, without her conſent.

In 1742, about ſix months before he died, he executed a bond to her, with condition that if he, his heirs, executors, adminiſtrators or aſſigns ſhould pay to her, her heirs, *&c.* 10,000*l.* within three months next after his death, then the obligation to be void. This was executed and delivered to her.

He afterward made his will; deviſing his real eſtate to her and her heirs, ſo as ſhe intermarried with *William Johnſon*; but if ſhe refuſed to marry him, he gave this real eſtate to *William Johnſon* and his heirs, making her executrix, and giving her all his perſonal eſtate, under the deſcription of all goods, chattels, debts and perſonal eſtate.

She refuſing to marry *William Johnſon*, forfeited the real eſtate to him; and he dying deviſed the eſtate to his father; who brought this bill againſt her, having married Sir *Edward Smith*, to have the perſonal eſtate of *Joſeph Johnſon*

(g) 1 Brown, 445.

Johnſon applied in exoneration of his real, and particularly toward ſatisfaction of the 10,000*l.* claimed by her on the bond.

Which brought a queſtion before the court, whether the defendant was intitled to the benefit of the aſſignment by the deed poll, and alſo to the bond? It being argued for the plaintiff, that both ſhould not ſubſiſt; for the court leans againſt double portions, even in the caſe of legitimate children.

For defendant. The queſtion is, whether the plaintiff is intitled to ſet aſide this deed in a court of equity? Conſider it in two views. Firſt, whether this is a good aſſignment independent of the bond? although as to creditors it is merely voluntary: yet the deviſee or grantee of the real eſtate cannot impeach, or come into equity to prevent a recovery upon it. Though the father had acceſs to theſe ſecurities afterward, ſhe had the cuſtody of them; and the keeping the key is evidence of the poſſeſſion, actual proof of the delivery to her is not to be expected; and if ſhe had poſſeſſion before, that excuſes delivery. Something paſſed by this aſſignment; for though by grant of bonds and ſecurities, the debts do not paſs, the paper, wax, *&c.* does. 1 *Inſt.* 32. *B.* Next to conſider, whether the bond is a ſatisfaction of what was given before? It is his own deliberate act; and had he ſo intended at the time of the execution of the bond, he would have ſaid ſo, or cancelled the aſſignment. The doctrine of ſatisfaction has been declared to have gone farther, than if it was *res integra*, in the conſtruing a gift to be a ſatisfaction of a precedent debt. But a ſubſequent debt was never held a ſatisfaction of a prior gift, nor can one gift be a ſatisfaction of another; nor a legacy a ſatisfaction of a prior gift: although a gift in the life of the party has been held a ſatisfaction of a legacy. This is a queſtion between one gift and another; and there is no inſtance of curbing the teſtator's bounty. The principle of the court in caſes of ſatisfaction depends on two rules; that it muſt appear to be the intent of the donor, and that it ſhould be ſomething of the ſame kind. In the caſes of double portions, there is a competition between perſons in the ſame relation, as between children; and therefore a double portion might injure the reſt. But the plaintiff's title is by forfeiture, and ariſes from a condition in reſtraint of marriage, which the court will never favour; and the deeds themſelves import diſtinct bounties. Caſes applicable are 2 *Ver.* 258. 1 *C. R.* 199. and *Oliver Brigham*, (315)

Brigham, or *Brighouſe* at the *Rolls Decem.* 1732, and *Sudal* v. *Jekyl*, on the will of Sir *Joſeph Jekyl*, where a gift in the lifetime and a proviſion at the death were both decreed to the party.

LORD CHANCELLOR.

The general queſtion is not, what is contended on the part of the defendant, whether the plaintiff is intitled in a court of equity to ſet aſide this deed of aſſignment; for that is a different conſideration; but whether the defendant is intitled to both or confined to one; although ſhe may have an election? The intent of *Joſeph Johnſon*, who made both theſe proviſions, is very material, and ought to turn the ſcale of any doubt; both parties being equally volunteers. Two queſtions ariſe in this caſe: Firſt, what was the intent or effect of the aſſignment, as it ſtood originally, and to the time of the execution of the
(316) bond? Next, whether any alteration has been made thereby, and whether the bond is to conſidered as accumulated to the deed poll, or to be ſubſtituted in its place?

As to the firſt, I am of opinion, that notwithſtanding the ſtrong words of it, it was not his intention to give his whole perſonal eſtate to the defendant in his life, but a kind of gift *mortis cauſa*, and to take place only at the time of his death. I think that all the circumſtances of this cauſe are not before the court; not indeed by the default of the parties in a tranſaction of this kind between a father and his natural daughter. But it appears from the words of the deed itſelf, following the ſtrong expreſſions which gave her an immediate property. They are very dark words, yet mean ſomething. One would ſuſpect he had made a will at that time; for ſomething he had done, to create a farther teſtimony of his intent; but as it does not appear what, or whether he had made any will before the laſt, it muſt be laid out of the caſe. The acts which he did, ſpeak ſtrongly for the conſtruction I make. It does not appear, this deed was ever delivered to the defendant, but was put by the teſtator among his own writings; and the evidence on the part of the defendant proves not, that the cuſtody of it was given to her to make uſe of it as ſhe pleaſed; and ſeveral acts of his ſpeak the contrary. From the nature of the deed alſo, and his circumſtances at the time, it is not to be preſumed, he would aſſign to a natural daughter, then living with him, not of age, for whom no match had been propoſed, or immediate proviſion wanting, his whole perſonal

ſonal eſtate; and veſt the immediate property of it in her, out of his own power; which is incredible: his intent appearing to be to keep this deed in his own power, to make a proviſion for her, which ſhe ſhould have the benefit of after his death.

As to the next conſideration. I am of opinion, the defendant is not intitled to both; and that the bond was not intended as accumulated, but as making a different proviſion for her, of which ſhe will have an election. And notwithſtanding the ſtrong declarations of his affection for her, and intent to leave her all, it amounts to little; for the teſtator plainly intended *ſub modo* ſhe ſhould have all. Although ſhe is not to be blamed for not complying, as ſhe might have her reaſons for it; yet ſtill it contradicts his intention, which was, that the eſtate ſhould go in his name: and very probably at the time of giving this bond, he had the making the will in view: but in all events he would make her a fortune of 10,000*l.* which is very ample. The court would not make the conſtruction contended for by the defendant in caſe of a legitimate child; for which there are very ſtrong caſes: as *Thomas* v. *Keymis*, 2 *Ver.* and *Upton* v. *Prince* by Lord *Talbot*; where it was held, there ſhould be no double portion, although a ſtrong caſe for it: much leſs than for a natural child. The caſes mentioned do not come up to this. It is ſaid, the rule of double portions holds only among children themſelves, and not among collaterals or ſtrangers; but there are no caſes relating to double portions, where that diſtinction is made, nor any reaſon for it, as it is a queſtion of intent: nothing of that kind is relied upon in 2 *Ver.* 258. In *Thomas* v. *Keymis* the rule was the ſame; though the eſtate might have gone over to collateral relations: the intention therefore was to ſubſtitute one in place of the other, which he had always kept in his own power and cuſtody; and which, if in his life the defendant had brought a bill, the court would not have decreed to her. He meant in all events to ſecure 10,000*l.* and ſo far as the perſonal eſtate is deficient thereto, the real ſhould make it up: but the defendant is not intitled to both, but to have her election.

(317)

Caſ. Tal. 71.

Henkle

(h) 1 Wms. 147, Supra 520.

Caſe 156. Henkle *verſus* Royal Exchange Aſſurance Company, *November* 14, 1749.

Policy of inſurance.

THE plaintiff inſured a ſhip at and from *London* to *Oſtend*, from thence to *Rotterdam*, from thence to the *Canaries*, warranted an *Oſtend* ſhip: which ſhip was afterward taken.

Bill to rectify it according to the intent, diſmiſſed, there not being evidence to vary the contract.

The bill was brought to have the policy rectified; for that the intention of the parties was miſtaken therein; which was that the warranty ſhould not have been ſo general, *viz.* ſhould take place from *Oſtend* only, not from *London*: and though courts of law will in the caſes of policies by the uſage of merchants admit parol evidence, yet not ſo as to rectify a miſtake on parol evidence, as this court will: as by his *Lordſhip* in the caſe of *King-ſtreet St. Margarets*, and in *Motteux* v. *London Aſſurance Company*, *December* 1739, where the queſtion was, whether the ſhip was to be inſured in port, or in the voyage to *London*, having been loſt in port? The evidence here was the depoſition of *Knox*, who tranſacted on the part of the company, that the plaintiff applied to him to inſure the ſhip; and that he believed that the plaintiff told him, ſhe was or had been an *Engliſh* ſhip, and might ſay ſomething concerning the manner or intent of making her an *Oſtend* ſhip; but that his anſwer was, that he would not enter into the manner, but that if the plaintiff would warrant her to be an *Oſtend* ſhip, he would inſure: and that on theſe terms and no other the agreement was made. There was the evidence of another perſon, who varied from *Knox*: but it was ſaid, the circumſtances ſpoke ſtronger than any evi-
(318) dence, that the intent was, that ſhe ſhould be an *Oſtend* ſhip at the time of leaving *Oſtend*, ſhe being then in *London*, and could not be an *Oſtend* ſhip, without going to *Oſtend*; for which proof was read, that it was neceſſary ſhe ſhould be regiſtered. Such was the imagination of the parties; and it is abſurd to ſuppoſe, the plaintiff would warrant her to be ſo, when he knew ſhe was not; although in general, inſurances are proper to be tried at law, yet not always ſo; this court ſending to law under particular directions. The plaintiff's equity is, that this policy, which at law muſt ſtand on its own foundation, is not agreeable to the intent of the parties; and a miſtake is a profeſt head of equity; which cannot be proved but by the perſons contracting: nor

(i) 2 Atk. 31. Poſt, 456. 2 Vol. 376.

nor can the plaintiff make uſe of his material evidence at law. That this court will interpoſe in ſuch caſes, appears from *Callaway* v. *Ward*, 1728, which was a bill againſt the inſurers of the *Sun-fire Office*; where the plaintiff had the leaſe of a houſe inſured; and before its expiration entered into an agreement for a new leaſe: but before execution, though after expiration of the leaſe, the houſe was burned: upon application for payment, as within the policy, on the foot of this parol agreement, the office denied it; for that at the time of burning it was not the plaintiff's houſe: Lord *King* determined for the plaintiff, upon the ground of conſidering that as done which ought to be done: yet that was as little favourable for the interpoſition of the court as could be, and the *Houſe of Lords* was of the ſame opinion. As to the objection, that this is an illegal trade, and therefore the plaintiff, party to an illicit contract, is not intitled to recover; that argument cannot lie in the mouth of the defendants, who were acquainted with it, and ought to pay the loſs. This, though a trading to an enemy's port in time of war, is not an illicit correſpondence; the caſe of *D'Oliphant* v. *South Sea Company*, and the caſe of Sir *Robert Nightingale*, anſwering that objection. And though the law prohibits the importation of enemy's goods, it prohibits not the carrying the growth of this country, unleſs proviſions to enemies.

LORD CHANCELLOR.

No doubt, but this court has juriſdiction to relieve in reſpect of a plain miſtake in contracts in writing as well as againſt frauds in contracts: ſo that if reduced into writing contrary to intent of the parties, on proper proof that would be rectified. But the plaintiff comes to do this in the harſheſt caſe that can happen: of a policy, after the event and loſs happened, to vary the contract ſo as to turn the loſs on that inſurer, who otherwiſe, it is admitted, cannot be charged: however if the caſe is ſo ſtrong as to require it, the court ought to do it.

The firſt queſtion is, whether it ſufficiently appears to the court, that this policy, which is a contract in writing, has been framed contrary to the intent and real agreement? Secondly, ſuppoſing it ſo, whether this is ſuch a caſe, under the circumſtances of it and nature of the trade, as that the court ought to interpoſe and relieve. (319)

As

As to the firſt, it is certain, that to come at that there ought to be the ſtrongeſt proof poſſible; for the agreement is twice reduced into writing in the ſame words, and muſt have the ſame conſtruction: and yet the plaintiff ſeeks, contrary to both theſe, to vary them; and that in a caſe where the witneſſes on the part of the plaintiff vary from each other. The ſingle depoſition, upon which it depends is very uncertain; and imports, that they relied on the plaintiff's warranty; leaving the manner of making her an *Oſtend* ſhip, to himſelf. Then as to the circumſtances, during the whole voyage ſhe certainly was to be an *Oſtend* ſhip: and if the intent of the parties was, as the plaintiff ſays, there ſhould be ſome proof of that. The witneſſes do not ſay it was neceſſary the ſhip ſhould go to *Oſtend*, but that ſhe ſhould be regiſtered: if ſhe was not an *Oſtend* ſhip at the ſailing from *London*, ſhe might be taken by an *Engliſh* privateer, becauſe the end of her voyage was an enemy's port; and the cuſtom-houſe books not concluſive to the captors; who may ſhew that the voyage was to the *Canaries*, notwithſtanding a different entry there. The plaintiff's miſtaking the law of *Oſtend* will not be a ground to vary the agreement; for if the other ſide knew of it, it is nothing to them, nor turns the loſs on them: and there is no colour, that they knew of it, or even that the plaintiff thought it was ſo. But in what caſe on this uncertain proof am I to turn the loſs on the defendant? in a caſe wherein they would have no conſideration, as the *premium* might be recovered againſt them; for it is laid down, that if the ſhip was never brought within the terms of the inſurance, ſo that the inſurer never runs any riſk, the *premium* muſt be entered in an action by the aſſuree: in which caſe the aſſured never would have brought a bill to rectify, but would have taken it on the foot of the policy.

Equity relieves againſt uſurious, but no other illicit contract.

Another point has been argued, which I will ſpeak to, although I ſhall not go on it in my determination. It is certainly a general rule, that a plaintiff muſt come into equity with clean hands; and ſeveral caſes at common law and in equity have gone upon this, that if the contract relates to an illicit ſubject, the court will not ſo encourage the action as to give a remedy. Therefore on an action to recover back money taken by way of bribe to a cuſtom-houſe officer, or on a corrupt agreement, the court ſays, it will not lie, as the plaintiff was a party thereto; nor is it any anſwer, that the defendant knew of this illegality; for that anſwer would ſerve in all thoſe caſes; and therefore

fore the court will ſtand indifferent. But one exception occurs in theſe caſes, and in which equity differs from the common law; for generally the rule is the ſame, only equity adheres a little ſtricter to it: and that is the caſe of *uſury*, in which equity ſuffers the party to the illicit contract to have relief. But that depends on a diſtinct reaſon: that whoever brings a bill in the caſe of *uſury*, muſt ſubmit to pay principal and intereſt due, on which the courts lays hold and will relieve; with this farther reaſon, that his court conſiders uſurious contracts in ſomewhat a different light from what the law does: which conſiders them upon the foot of the ſtatutes: but this court as a fraud and advantage taken on neceſſitous perſons. Now to apply this. I am not ſatisfied with the anſwer given to the objection of its being illicit, ariſing from the caſe of the *South Sea Company*, for that was not trading contrary to the law of this country, but contrary to the agreement with the company; which is different from a contract contrary to the general law of this country, whether ſtatute, common, or maritime law. So of Sir *Robert Nightingale*'s caſe; which was but a plea in the *Exchequer*, and but the private right of the company; being contrary only to their ſtatutes, not to the general law of the land; for in ſuch caſes no remedy could be in law or equity. No determination has been, that inſurance on enemies ſhips during the war is unlawful: it might be going too far to ſay, all trading with enemies is unlawful; for that general doctrine would go a great way, even where only *Engliſh* goods exported, and none of the enemies imported, which may be very beneficial. I do not go on a foundation of that kind; and there have been ſeveral inſurances of this ſort during the war, which a determination upon that point might hurt. To ſay no remedy could be in law or equity, it muſt be very clearly ſo, and not by any ſtrain. As to the caſe of inſurance on wool tranſported to *France*, I never doubted, but that was an unlawful contract; and therefore if a caſe came before me, when I was *Chief Juſtice*, both ſides knowing it, and a ſeiſure for that by the cuſtom-houſe officer, I ſhould have held it an illicit inſurance and contract.

But upon the firſt point there is no evidence to vary the contract, from the written words: therefore the bill muſt be diſmiſſed; but without coſts, for it appears to be a loſs by a capture not within the intent of the parties.

Durour

Caſe 157. Durour *verſus* Motteux, *November* 21, 1749.

Mortmain.

Statute 9 *G.* 2.

(321)

Deviſe of money to be laid out in land for an annuity to a miniſter to preach an annual ſermon and keep a tomb ſtone and inſcription in repair, and to a corporation for keeping account thereof; a charitable uſe, and void by the ſtatute.

TIMOTHY MOTTEUX in 1745 made his will, giving all his real eſtate to truſtees, to ſell and diſpoſe of the whole, with his perſonal eſtate, for payment of his debts, legacies, and performance of his will; he gave ſeveral legacies, and among the reſt 1200*l.* or thereabout, whereof part was to be laid out in the purchaſe of freehold lands for ſome charitable uſes, part of which were confeſſedly within the late *Mortmain* act. The remainder of the ſaid lands were to be a fund for a perpetual annuity of 10*l. per ann.* to a miniſter, to preach a ſermon once a year to his memory, to keep his tomb-ſtone in repair, and the inſcription thereon and upon the ſtone againſt the wall, reciting the gift, legible, of which the miniſter was then to make oath; and 2*l. per ann.* to the clerk, and 2*l.* more to the ſexton for ever; with 4*l. per ann.* to the mayor and corporation of *St. Albans* for managing and keeping account thereof: and that the truſtees ſhould place out all the reſidue of his eſtate and intereſt thereon upon ſecurities and divide among ſeveral perſons.

It was inſiſted, that though the deviſe of the rents of the land to be purchaſed with the 1200*l.* was ſo far void by the ſtatute, as they were to be applied to charitable uſes, yet that made not the application of the remainder thereof void, which did not come within that deſcription; ſuch as the uſes intended to honour his memory, and as a benefaction to the corporation; which, being private and perſonal gifts, come not within the reaſon of charitable uſes though given to poor perſons. If it was copyhold, the court would not interpoſe to ſupply a want of ſurrender; nor would it be an appointment within the ſtatute of *Elizabeth:* land may be deviſed now to a corporation (as to the *City of London*) in the ſame manner as before the ſtatute; for the giving lands to a corporation for their own benefit barely as an aggregate body is not a charitable uſe, unleſs the particular purpoſe, for which it is given, makes it ſo.

LORD CHANCELLOR.

Vide *Attorney General* v. *Day.* Ante,

If I ſhould not call this a charitable uſe, it would be a ſtrange conſtruction of this act of parliament, and would eſtabliſh all the vanity of ſuch diſpoſitions. The miſchief, which

which the legiſlature had in view, (as appears from the recital, which is agreeable to the title) was to reſtrain the diſpoſition of lands, whereby they became unalienable. The chief occaſion introducing that miſchief was, gifts to charitable uſes by men in their laſt moments, when they were under the greateſt temptation to give them ſo; upon which circumſtance the legiſlature laid hold to prohibit ſuch diſpoſitions. As to this: it might be a queſtion, whether not void for uncertainty, from the words *or thereabout*. But it is admitted to be contrary to this act, provided it comes within the deſcription of charitable uſes, and part of the diſpoſition is objected not to be ſo. The charitable uſes are the beſt part of the diſpoſition; and it would be very unfortunate, if that part, which is really good, were (322) it not for the above mentioned inconvenience, ſhould be ſet aſide as void; and at the ſame time it ſhould happen, that the worſt, ſuch as tends only to perpetuate the vanity of the teſtator, ſhould be eſtabliſhed. This perpetual annuity to the miniſter is a charitable uſe; which is not prevented by the addition of the annual ſermon. So are the other two annuities; and the reſt is not only a vain concomitant of the charitable bequeſt, but a circumſtance attending the general execution thereof: and if this conſtruction were not made, it might elude the act of parliament; for the reward for doing theſe offices might be as great as the teſtator pleaſed. So the gift to the corporation is a reward for their ſervice, and but a circumſtance attending the charitable bequeſt: and though the keeping the accounts is not void, yet if the charity, on which it was to attend, is void, it muſt be ſo too.

The whole of this 1200*l.* therefore being a void deviſe, the queſtion was, whether it ſhould go to the heir at law, for which was cited 3 *Wms.* 20, or to the reſiduary legatee?

LORD CHANCELLOR.

It is not neceſſary to enter into the queſtion of a deviſe of land, being void originally or becoming ſo by dying in the life of the teſtator, where in the ſame will there has been a deviſe of the reſidue; in which caſes there has been a difference of opinion, whether it ſhould go to the heir at law or reſiduary deviſee? I believe, (k) the laſt determination

Reſiduary bequeſt of perſonal eſtate includes every thing as a void legacy, or one lapſing by the dying in teſtator's life.

(k) 3 Wms. 19. 4 Edw. and 22 Note 1. where a diſtinction is made, where teſtator intends the real eſtate to be applied as perſonal to *all intents*, or only to the *particular purpoſes* of the will. Talb. 79, ante, 108.

tion has been for the heir at law. But that is different, and has been on the conſideration of a caſe, that a man having land could not deviſe a right accruing afterward to him relating to the real eſtate: but that is not the caſe of perſonal eſtate, which may be diſpoſed of, though accruing afterward to him, or thoſe in repreſentation of him, being ambulatory. And in this caſe I am of opinion, the money, that ſhould ariſe by ſale of this real eſtate, is turned into perſonal by the teſtator, and ſo intended; it plainly appearing that by the deſcription of *all* his perſonal eſtate he meant to include the whole in the reſidue: ſo that it is to be conſidered now as perſonal. For ſeveral caſes in which this court has determined land, directed to be converted into money, are to be ſo conſidered, *& e contra*. Then it comes to this; a will is made, in which ſeveral legacies, and the reſidue of the perſonal eſtate are given away; one of the perſonal legacies void by law: the court cannot ſay for that reaſon, contrary to the expreſs will, that he intended to die inteſtate; for giving the reſidue over includes every thing, let it fall in by reaſon of that legacy's being void, or lapſing by dying in the life of the teſtator.

(323)

Caſe 158. Maſcal *verſus* Maſcal, *November* 22, 1749.

Baron *Clarke* in the abſence of Lord *Chancellor*.

A agrees to ſettle 100*l. per ann.* on intended wife; falling ſick deviſes 100*l. per ann.* to her; recovering marries her, and the ſettlement is carried into execution; ſhe can take but 100*l.* and parol evidence admitted to prove the intent.

JOHN MASCAL agreed to ſettle 100*l. per ann.* on his intended wife, but finding himſelf ill, made his will and left her 100*l. per ann.* but recovering, the marriage was ſoon after had, and the ſettlement carried into execution.

After his death ſhe diſtrained for 200*l.* againſt the deviſee of the eſtate; who brought this bill to oblige her to take but 100*l. per ann.*

For Plaintiff it was inſiſted, that this court commonly leans againſt double ſatisfaction. The teſtator intended only 100*l.* rent charge for the defendant: and its being by two different inſtruments ariſes only from change of circumſtances: and for this parol evidence was offered; the reading which was objected to.

Baron

Baron *Clarke:* (l) If this was a queſtion only on a will, no doubt but the declarations of what he intended by will could not be read. But as this is not to conſtrue the will, but a queſtion, whether or no one is a ſatisfaction for the other? I ſhould at preſent think that if you allow parol evidence on one ſide, you muſt on the other. *Parol evidence.*

For defendant. This being to read declarations of teſtator's intending the ſettlement to be a revocation of the will, is allowing parol evidence contrary to the ſtatute of frauds, which ſays, no will ſhall be made or revoked but by writing, and it is explaining a deed contrary to what it appears. It may indeed be admitted in ſome caſe: as where a reſulting truſt, to rebut the conſtructive declarations of the truſt put on the words contrary to the legal ſenſe. But here the defendant claims by a legal right. Notwithſtanding the inclination of the court to admit the reading it, there are caſes, where the court cannot do it. There was a ſtrong temptation to admit it in *Brown* v. *Selwyn*, yet it was not allowed; which caſe is like this, but ſtronger. *Tal.* 240.

For plaintiff. The queſtion in that caſe was litigated; and Lord *Hardwicke* was of a different opinion to the laſt. It is admitted to prove the identity of the perſon; or rebut an equity: ſo where there is a particular gift to an executor by implication making him a truſtee for the reſiduary, parol evidence may be given, that the teſtator knew that, and yet intended it: and may be given to the contrary. In all caſes of ſubſequent ſatisfaction it is allowed on both ſides to ſhew the intent of the teſtator. This is a mere collateral matter, and, if not admitted, would make the ſtatute a groſs cover to fraud. Beſides the defendant has examined the ſame witneſs to the ſame purpoſe. (324)

Baron *Clarke:* It is proper to be read. It is ſaid, here are convincing circumſtances, that the ſettlement is a ſatisfaction of the will; which was only to ſecure an annuity if he died before marriage. Both are left ſubſiſting; and the queſtion is, whether here are not two proviſions made for the ſame thing? * It is impoſſible to come at the facts, by which the court is to judge, but by being made out by evidence; nor can the party's intent be proved. The objection

(l) In 3 Wms. 353. Lord Talbot refuſed parol evidence to ſhow the intent, as then the witneſſes and not the teſtator would make the will.

* Evidence cannot be read to prove what teſtator meant by words uſed in his will, but may as to facts upon which teſtator made his will, per Lord Thurlow, 1 Brown, 296.

jection made, would go a great deal too far; but the defendant examining the ſame witneſs is unanſwerable. In *Brown* v. *Selwyn* Lord *Talbot* firſt allowed the reading it; but afterward changed his opinion. And the reaſon he and the *Houſe of Lords* went upon, was, that it was an examination to contradict the words of the will: but this does not contradict that.

Ante.

Then for the defendant was cited *Robins* v. *Cape* on the will of Mr. *Spinks*, who thereby gave legacies to the two plaintiffs; and afterward executed bonds to the ſame perſons, although under no obligation to give them any thing: it being inſiſted on as a ſatisfaction, Lord *Chancellor* ſaid, there were no inſtances, that a ſubſequent debt could be a ſatisfaction for a precedent bounty, the caſes of ſatisfaction being *vice verſâ*. The time of making the declarations is very material in caſes of ſatisfaction; and no regard to be paid to declarations not at the time of making the will.

Satisfaction.

Baron *Clarke* was of opinion, that the defendant muſt make an election, which 100*l.* ſhe will chuſe. (m) Not that one is a ſatisfaction for the other; but it was a completion of the act; and the ſettlement was a corroboration of the will.

Caſe 159. Knight *verſus* Dupleſſis, *November* 23, 1749.

Of appointment of a receiver on a bill by heir at law againſt deviſee.

LORD *Colerain* deviſed his eſtate to the defendant Mrs. *Dupleſſis* (by whom he had a natural daughter) till her daughter arrived at twenty-one or married; making her executrix with another perſon, who both propoſed to act and prove the will, having propounded it to the *Eccleſiaſtical* court.

The

(m) Eq. Ab. 2 Vern. 498, 555, 709, 724. 1 Wms. 324. 3 Wms. 335. 3 Atk. 419. Prec. Chan. 240. 5 Brown's Parl. Cas. 567. 7 Vol. 12. Contra 2 Vern. 505. 2 Wms. 614. 3 Wms. 356. 2 Vol. 409. Brown 129. where Lord Thurlow after giving the reaſon for theſe different determinations agrees with the latter, and relies on a rule laid down by Lord Hardwicke, 3 Atk. 96, that where there is a difference in any circumſtance between a legacy and a debt, the legacy ſhould not be deemed a ſatisfaction. In the new edition of Prec. Chan. 240, Mr. Finch has reported the caſe of Deveſe and Ponlet, determined at the rolls, Mich. Term. 1785, where the maſter of the rolls, in concurrence with the authority of Lord Thurlow, determined agreeable to the doctrine of theſe latter caſes, that a deviſe is not a ſatisfaction for what the wife is entitled to under marriage articles.

The heirs at law brought a bill to controvert the will, and moved for an injunction to ſtay the defendants from receiving the perſonal or the rents and profits of the real eſtate, and to have a receiver appointed; which, the anſwer not being come in, was denied.

And now immediately on the anſwer's coming in, it was moved again, on the ground that there was a diſpute in the *Eccleſiaſtical* court concerning the probate; which not being yet granted, there was none to get in the debts, *&c.* therefore this court ſhould appoint a receiver; as in *Powis* v. *Andrews:* and as to the real eſtate, the tenants will not pay the rents to any of the contending parties; ſo that they are in danger of being loſt. And an affidavit was read, that Mrs. *Dupleſſis*, the ſole truſtee for the receipt of them during the minority of her daughter, was in low circumſtances. (325)

LORD CHANCELLOR.

This is a very early motion for a receiver; and no ground for it: not the leaſt colour as to the perſonal eſtate; for if the litigation in the *Eccleſiaſtical* court is likely to be long, the court has juriſdiction to grant adminiſtration *pendente lite*, which adminiſtrator as it is now ſettled, may maintain an action to recover the debts, whereby no loſs can be to the perſonal eſtate: therefore not like *Powis* v. *Andrews*, or the caſe before Lord *Harcourt*, upon which that of *Powis* was founded. For there was a will on extraordinary circumſtances, and a probate got, after which they could not appoint an adminiſtrator *pendente lite*; ſo that there was no other method for the next of kin againſt a will obtained by fraud. As the circumſtances now ſtand, they are ſtronger in favour of the will, which is all in the teſtator's hand, than againſt it. On the firſt production the heir at law appeared well ſatisfied therewith; and no imputation upon one of the acting executors: nor is there any ſuch rule, that on a diſpute in the *Eccleſiaſtical* court concerning a probate, this court ſhould appoint a receiver of the perſonal eſtate.

This court is not to appoint a receiver on account of a diſpute in *court eccleſiaſtical* concerning the probate.

And a great deal of what I have ſaid, goes to the real eſtate, it not being to be laid down as a rule, that on a bill by heir at law to controvert a will, this court is to appoint a receiver. He may bring an ejectment if the will is not good; and the court will aſſiſt him by looking into deeds and writings. There is no ground to come for a receiver,

unleſs other circumſtances: and as to the tenant's not paying the rent, that has been a ground ſometimes to appoint a receiver; but the evidence for it is very ſlight; and the teſtator died but laſt *Auguſt*. The moſt material part regards Mrs. *Dupleſſis*; the nature of the deviſe to her, is a kind of chattel intereſt, during which, for aught appears, ſhe has the legal eſtate in the land. It is a looſe affidavit, that ſhe is a perſon of little or no fortune, without any ſuggeſtion of bad behaviour in her, and is not a foundation in the outſet of a cauſe to appoint a receiver. If that was the rule, in every caſe where there is a will, and a truſt term to a perſon not in very opulent circumſtances, though not guilty of any miſbehaviour, the court ſhould change the truſt: beſides this would bring an imputation upon the will, which the court is not to do.

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The plaintiffs therefore muſt take nothing by their motion.

Caſe 160. **Anon.** *November* 23, 1749.

Inrolment of decree vacated being too quick, though ſtrictly regular.

MOTION to vacate the ſigning and inrolling the decree. No *caveat* to prevent the inrolment had been entered with the ſecretary for decrees and injunctions, the proper officer; the party by miſtake applying to the *Rolls* chapel to enter a *caveat*; which was not the proper place; and when he afterwards went to the ſecretary for that purpoſe, it was not till after it had been tendered to his *Lordſhip* to be ſigned.

LORD CHANCELLOR.

Diſpatch and expedition is certainly to be commended; but that muſt be in a reaſonable ſenſe, for the ſigning and inrolling decrees is notwithſtanding not encouraged, becauſe the doing it tends to create greater expence on the parties, if there is a ſmall miſtake, *&c.* in the decree occaſioning either an appeal to the *Lords* or a bill of review, eſpecially in decrees for account: for often in the courſe of the account, ſome particular direction neceſſary to do juſtice has been found out, which could not appear before, upon which liberty has been granted to rehear; which, if the decree is ſigned and inrolled, cannot be done: and therefore Sir *Joſeph Jekyl* has ſaid, they ought not to be too quick. The court ſeeing the inconvenience of the quick ſigning of decrees, is the reaſon of giving liberty to the

the party to enter a *caveat* without giving any reaſon for it, which will prevent the inrolling for a month. I never knew greater diſpatch than in the preſent caſe; therefore, though it is ſtrictly regular, yet being ſo quick, it is within the reaſon of the common law courts ſetting aſide judgments every day, as on ſurpriſe; although they are ſtrictly regular. So may this court, eſpecially when it partly ariſes on the defendant's miſtake.

It muſt therefore be vacated.

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Billon *verſus* Hyde, *November* 25, 1749. Caſe 161.

JOHN FRANCIS MITCHEL, an *Italian* merchant, became bankrupt *April* 18, 1743, having great dealings a conſiderable time before; but the act of bankruptcy then committed was a ſecret act, very little known, as it was admitted; he afterward appearing upon change and other public places, and in all reſpects without ſuſpicion of being a bankrupt or in inſolvent circumſtances.

Payments made without fraud by *A.* after a ſecret act of bankruptcy, and before the commiſſion being recovered at law in *indebitatus aſſumpſit* by aſſignees againſt *B. B.* ſhall in this court be relieved as to payments made by him to *A.* within the ſame period, and ſhall be allowed the ſame.

There were large dealings between the plaintiff and him, and an account commenced *November* 1742, and theſe dealings continued after the act of bankruptcy till the *June* following, and were very various: but they appeared to be fair; principally conſiſting in remittances and negotiating bills of exchange to *Italy* or other parts of the world, and ſeveral ſums were paid by the plaintiff to him during the ſpace of time between *April* and *June*; ſome to him, others to his order, ſome by way of loan, and particularly by ſome *items* paid by the plaintiff for *premiums* on inſurance upon ſhips for his benefit; and others for goods at the cuſtom-houſe. But the ſums of money paid by him to the plaintiff amounted to 3018*l.* 2*s.* 2*d.* bills of exchange drawn by the plaintiff.

After the commiſſion of bankruptcy iſſued, and aſſignment was made, the aſſignees ſeeing this tranſaction, and that theſe ſums were paid after the act of bankruptcy was committed, brought an action of *indebitatus aſſumpſit* in *B. R.* againſt the plaintiff for theſe ſeveral ſums, as for money had and received to the uſe of the aſſignees. It was tried on *non aſſumpſit*; and it appearing theſe ſums were paid after the act of bankruptcy was committed, the

aſſignments by relation overcharged it, and avoided meſne acts; ſo that they recovered in that action.

The plaintiff here inſiſted, that notwithſtanding that recovery by the ſtrict rule of law, ſtill an allowance ought to be made him for all that was paid to *Mitchel* on the other ſide of the account falling within the ſame period of time, amounting to 712*l.* that this was not done then, and was refuſed by the commiſſioners ſince. The bill therefore was to have this ſum deducted out of the 3018*l.* 2*s.* 2*d.*

The aſſignees inſiſted, he was not intitled thereto: that that was quite a diſtinct thing; conſiſting parrly in loans, partly of money advanced for other purpoſes. The aſſignees have recovered by their own ſtrength: then why ſhould the plaintiff recover, being diſtinct perſons and in diſtinct rights? and the bankrupt could not contract any debt to charge his eſtate, or to charge the aſſignees after the act of bankruptcy committed; and upon that reaſon it was over-ruled at the trial.

Lord Chancellor ſaid, that deciſions of courts of law in ſuch caſes have been ſo ſtrict, that it may be pretty difficult to come at the relief ſought: and yet he feared, if the plaintiff had not ſome relief, it would be attended with great injuſtice; and if he could find a ground to relieve
(328) the plaintiff he would: but for that it muſt have equitable circumſtances. Therefore he would conſider of it; and now delivered his opinion.

Two queſtions ariſe: firſt, whether the plaintiff is intitled and has a right to have this allowance and deduction made? The ſecond, ſuppoſing it ſo, whether he has purſued a proper remedy: or whether this matter is not ſo concluded by the judgment and verdict at law, that the hands of this court are tied up; and therefore the plaintiff not intitled to relief, if the law will not relieve?

As to the firſt: I am of opinion the plaintiff has a right to it; but that will depend on the nature of the demand at law, of the defendants and aſſignees under the commiſſion, and the nature of the remedy they have purſued for it.

Aſſignees overcharge meſne acts by relation.

As to the nature of the demand at law againſt the plaintiff for this money, paid by *Mitchel* for valuable conſideration, without fraud, after the act of bankruptcy committed,

mitted, it is *ſtricti juris*, and the hardeſt caſe the law of *England* admits, depending on the relation. By the act of bankruptcy all the real and perſonal eſtate veſted in the aſſignees, and the property veſted in them from the time of the act committed; and that may go back to a great length of time; and it overcharges all thoſe acts, without regard to the fairneſs or fraud in them. So that a ſale of goods by the bankrupt after the act committed is a ſale of their property; for which they may maintain *trover*. (n) So it is as to the payment of money: and this was the intent of the act of parliament; the ſtatute of *J.* 1. *C.* 15, 114, being, that this ſhall not extend to the prejudice of any debtor of the bankrupt, who paid his debt after the act committed, without knowing of it. This relation, the aſſignment has, does not only overcharge acts done in *pais*, and contracts entered into by ſuch perſons having committed an act of bankruptcy, * but alſo acts on record, and legal acts done by him, ſuch as judgments, ſo that if execution is taken out after the act committed upon a judgment before, that execution is undone and ſet aſide. It is ſaid, that this rule founded on this act of parliament is contrary to the general reaſon of the law; which ſays, that fictions of law and legal relations ſhall not enure to the wrong of any one; which is a general rule, invented to ſupport the right and equity of the caſe. But the reaſon of taking this caſe out of that rule is plainly this, and the law did intend it, on this general rule; that it is better to ſuffer a particular miſchief than an inconvenience: and the legiſlature foreſaw, there would be a particular miſchief which they cured by that *proviſo*: but did not extend it farther; becauſe the inconvenience on the other hand, of ſuffering bankrupts to diſpoſe of their effects by contracts or judgments would put it in their power to defeat their juſt creditors of their debts, ſo as it would be difficult commonly to find out, whether there was a mixture of fraud, the legiſlature thought it better to lay down that general rule. But trade becoming more extenſive, that act 19 *G.* 2. was

(n) By ſtatute 21 Jac. 1. Cap. 19. Sec. 14. Purchaſers for valuable conſideration ſhall not be prejudiced, unleſs the commiſſion is ſued out within five years after the bankruptcy; and by 19 Geo. 2. Cap. 32. Sec. 1. Payments made by bankrupt in the courſe of trade without knowing of it, ſhall not be affected.

* 1 Black, 67. Vide 2 Vern. 229. Where an award was made in an adverſary ſuit, and confirmed by the court, one of the parties being a bankrupt, but not known then to be ſo, and a commiſſion afterward taken out. The award bound the aſſignee under the commiſſion, there being no fraud or colluſion in obtaining it; but the reporter puts a quere, if the decree on a rehearing was not reverſed?

2. was made; and notwithſtanding it is ſaid, this caſe is not within that act, which it certainly is not in point of time, yet it is directly within the recital thereof. One principal caſe provided for by that act is the negotiating bills of exchange; which was a caſe very neceſſary to be provided for, becauſe negotiable in various parts of the world: therefore though this is not a caſe within the proviſion of the act, becauſe of the poſterior time of commencement: yet it is within the miſchief; and therefore courts of equity ought to go as far as is conſiſtent with the opinion of the legiſlature of the miſchief above mentioned. In what ſhape this was inſiſted on at the trial, does not appear; whether offered only in mitigation of damages; and then it was very natural for the court not to admit it: and the court might have thought, that at the meeting of the creditors they would have agreed on this; having power to compound the debts by agreement of the major part of the creditors by the new act of parliament.

But however that was, the next queſtion is, whether the plaintiff is intitled to have this allowance in ſome ſhape on the foot of the dealings themſelves, and next from the nature of the action brought by the aſſignees? And I am of opinion, he is intitled from the nature of the action and demand againſt him at law. (o) It is quite new to me, that aſſignees under a commiſſion of bankruptcy ſhould maintain an *Indebitatus aſſumpſit* (which is an action founded on contract) for money *bona fide* paid by the bankrupt after a ſecret act of bankruptcy to another perſon for valuable conſideration. How long that is in practice I know not: I thought they were obliged to bring action of *treſpaſs* or *trover* for the *tort:* otherwiſe they would be nonſuited; of which opinion were *Chief Juſtice Parker* and Lord *Raymond.* And for that purpoſe I have a manuſcript caſe at *Guildhall the ſittings* after *T. T.* 4 *G.* 1. It was an *aſſumpſit* by an adminiſtrator for money had and received, *&c.* and *non aſſumpſit* pleaded: the caſe was, the defendant was nurſe to the inteſtate during his ſickneſs; and being alone in the houſe when ſhe died, conveyed away money and every thing portable. The defendant objected, the action would not lie; there being no colour of contract, but

(o) This action has been much extended of late as a uſeful remedy; the ſame principle which ſupports it againſt one, who receiving money from the bankrupt himſelf, will ſupport it againſt another who receives it under the bankrupt; in both caſes it is the property of the aſſignees, who may elect to bring an action of *tort* or *aſſumpſit*, but not both. 2 Black, 830. 3 Wils. 304. 3 Lev. 191. Holt 95. 12 Mod. 324.

but a wrongful taking or converſion, for which *trover* lay. But *Parker C. J.* held the action maintainable; becauſe though the taking was wrongful, yet the plaintiff might agree afterward and make it right; and the bringing this action was an implied agreement: and that there were only two caſes, wherein an action for money had and received, *&c.* could not be brought, *viz.* for money won at play; and money paid after a bankruptcy; in both caſes unleſs you inſiſt on the *tort*, the *tort* is waved. He went upon this: that you cannot affirm part; and diſaffirm part; ſo that the plaintiff there might bring *trover* or *treſpaſs* for the *tort*, or an action for money had, *&c.* which the court laid down clear and without doubt, admitting two caſes in which that action could not be brought for wrongful taking. In the caſe of money won at play, the action muſt be on the *tort*, not for money had, *&c.* that admitting the contract at play. So I have ruled it at *Guildhall*, and I believe nonſuited a plaintiff, when he has gone contrary. The judges perhaps have gone further ſince, and admitted ſuch action rather than put the party to *trover*; and this action for money, *&c.* has been extended to advance the remedy of the party. Yet courts have gone a good way againſt this very ſtrict conſtruction of the act of parliament; and where *trover* was brought, have taken it out of the act; for which purpoſe is the caſe of *Rider* v. *Fowle*, 3 *Lev.* 58, which was directly within the words of the ſtatute, and within that legal relation, but the court would not conſtrue it within it; and the action that was brought for the money, was *trover*. But whether *trover* was the proper action is not the point now for conſideration; that being proper for the judge, who tried the cauſe. The queſtion now is upon the allowance; the aſſignees inſiſting on it by way of contract. Had the ſtrict remedy been taken and *trover* brought, it might be a ſtronger caſe againſt the allowance. There is no foundation to raiſe an *aſſumpſit*, which muſt be founded on contract either in fact or in law: and there was no contract in fact; for a contract muſt be with ſomebody. Here the law has determined againſt the contract by the relation from the intervention of the bankruptcy. It is ſaid, that the bankrupt muſt be conſidered as a truſtee; but hardly ſo; becauſe in the notion of this court a truſtee muſt have the legal eſtate for ſomebody. But why ſhould he not be conſidered as factor or agent for the aſſignees? And if aſſignees will go in this method, and affirm acts done by the bankrupt, it is right and juſt to take the bankrupt to their factor or agent as to all acts fairly done, although not ſo as to bind them by fraudulent

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fraudulent acts. And it must be so taken; for this action upon contract cannot be maintained but by contract on one side or other. It is very hard to say, assignees in this new method of proceeding by *indebitatus assumpsit* should be allowed to affirm acts of bankruptcy in part, and disaffirm in other part; which has been refused by courts of law; for which there was a material case in *B. R. Wilson* v. *Boulter*, *Hil.* 13 *G.* 1. where *trover* for money was brought by an assignee. Not guilty pleaded: it was tried by Lord *Raymond* at *Guildhall*, who, doubting, made a case of it, *viz.* *Boulter* in *May* 1724, became bankrupt; in *August* following a commission issued against him, under which the plaintiff was assignee: in the *June* between the bankruptcy and commission the bankrupt's wife delivered money to the defendant to buy *South Sea* and *East India* bonds; the defendant then knowing of the bankruptcy, and that the money was part of the bankrupts effects, brought thirty bonds, and delivered them to the wife: in *September* the plaintiff the assignee seised twenty-two of these bonds, and took them for the benefit of the creditors, as part of the bankrupt's estate; and brought *trover* for the
(331) money laid out in the remaining eight bonds. The question was, whether the defendant was liable in this action for the money? And the whole court was clear, that the assignees seising part of the bonds was an affirmance of the defendant's act in laying out the money; and that part could not be affirmed, and the other part disaffirmed. And this is in some measure allowing the act of the bankrupt on the foot of the contract, and yet disallowing it on the other side. This is a strong case, why the plaintiff in this cause should have a proper allowance.

But it is said, this allowance should have been made at law; and that it was determined at law, that he should not have it; which is conclusive. But I am of opinion, it is not conclusive; for as the assignees proceed on the foundation of the contract, this is a matter of account; and therefore though not allowed at law, this court, having jurisdiction of accounts, takes them notwithstanding the verdict: so will the court here allow to the plaintiff so much, as he ought to be allowed.

Which brings it to the question, how much he ought to be allowed; and as so great a sum as 3018*l.* was recovered from him; it is very hard for the assignees to insist, that any part of this 700*l.* should not be allowed. As to the equity of the case, I am very clear in my opinion:

but

but I own, I have difficulty as to the particular ſums to be allowed; the plaintiff having examined witneſſes, who have ſworn to part, and that the moſt conſiderable part, as lent; going on and ſaying ſo much lent, and ſo much paid: but this is very nice; and if by inquiry, or other method I can come at it, I will.

Therefore let the cauſe ſtand over: and I would recommend it to the aſſignee to compound in ſome manner; for it is very hard againſt the plaintiff.

It was afterwards compounded.

Row *verſus* Dawſon, *November* 27, 1749. Caſe 162.

TONSON and *Conway* lent money to *Gibſon*, who made a draught on *Swinburn*, the deputy of *Horace Walpole*, *viz.* "Out of the money due to me from *Horace Walpole* out of the *Exchequer*, and what will be due at *Michaelmas* pay to *Tonſon* and *Conway*, value received.

A. borrows money of *B.* and gives him a draught upon a fund due to *A.* out of the exchequer, and becomes bankrupt; this is an aſſignment thereof to *B.* for valuable conſideration, which ſhall prevail againſt the general aſſignees under the commiſſion of bankruptcy

Gibſon became bankrupt: and the queſtion was, whether the defendants *Tonſon* and the executors of *Conway* were firſt intitled by a ſpecific lien upon this ſum due to the eſtate of *Gibſon*; or whether the plaintiffs the aſſignees under the commiſſion are intitled to have the whole ſum paid to them; it being inſiſted for them, that this draught was in nature of a bill of exchange, and that the property was not diveſted out of the bankrupt at the time of the bankruptcy in law or equity?

LORD CHANCELLOR.

At firſt I little doubted about my own juriſdiction: and whether the plaintiffs ought not to have gone into the *Exchequer*, as being a court of revenue; for this is not a perſonal credit given to, or demand upon the officer: but to be paid out of that money iſſued out of the *Exchequer* to the officer; and this is on warrant, to be paid out of the revenue of the crown for public ſervices. But there is ſomething in the preſent caſe delivering it from that: the officer admits, he has received a ſum of money applicable to this demand, which brings it to the old caſe of a *liberate*, which a perſon

a perſon has under the great ſeal for the payment of money: upon admiſſion that the officer had money in his hands applicable to the payment, and proof thereof, that would give courts of law a juriſdiction, ſo that an action of debt might be maintained on the *liberate*.

This demand, and the inſtrument under which the defendants claim, is not a bill of exchange, but a draught; not to pay generally, but out of his particular fund, which creates no perſonal demand: therefore not a draught on perſonal credit to go in the common courſe of negociation, which is neceſſary to bills of exchange, by draught on the general credit of the perſon drawing, the drawee, and the indorſer, without reference to any particular fund. The firſt caſe of which kind, I remember to have been determined in *B. R.* not to be a bill of exchange, was a draught by an officer on the agent of his regiment to be paid out of his growing ſubſiſtence. Then what is it, for it muſt amount to ſomething? It is an agreement for valuable conſideration before hand to lend money on the faith of being ſatisfied out of this fund; which makes it a very ſtrong caſe. If this is not a bill of exchange, nor a proceeding on the perſonal credit of *Swinburn* or *Gibſon*, it is a credit on this fund, and muſt amount to an aſſignment of ſo much of the debt: and though the law does not admit an aſſignment of a *choſe in action*, (p) this court does; and any words will do; no particular words being neceſſary thereto. In the caſe of a bond it may be aſſigned in equity for valuable conſideration, and good although no ſpecial form uſed. Suppoſe an obligee receives the money on the bond, and there is wrote on the back of it "Whereas I have received the principal and intereſt from ſuch a one, do you the obligor pay the money to him:" this is juſt that caſe; only it is not a debt ariſing from ſpecialty: therefore like an aſſignment of rent by direction to a tenant or ſteward to pay ſo much of a year's rent to a third perſon. The caſe of *Ryal* v. *Rowles*, *Poſt.* now under the conſideration of the court, occurred to me. There the aſſignment of debts, of which no poſſeſſion, came in queſtion; but thoſe are debts depending on partnerſhip, and mentioned there how far the aſſignment of a bond ſhould be ſupported againſt the aſſignees under the commiſſion: and it is clear, that they have been ſupported where the bond has been delivered over; but if not, ſome doubt has been, whether it ſhould be ſupported on the foot of the clauſe in the

Choſe in action is aſſignable in equity; and no particular form requiſite.

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(p) And ſo is a poſſibility for valuable conſideration. Poſt. 391. 2 Vol. 6.

the ſtatute *J.* 1. But this is clear of that doubt, becauſe this was a debt due to *Gibſon* without any ſpecialty. This draught, which amounts to an aſſignment, is depoſited with the officer *Swinburn*, and therefore it attached immediately upon it: ſo that *Swinburn* could not have paid this money to *Gibſon*, ſuppoſing he had not been bankrupt, without making himſelf liable to the defendants; becauſe he would have paid it with full notice of this aſſignment, for valuable conſideration.

Thomas *verſus* Ketteriche, *December* 5, 1749. Caſe 163.

Diſtribution. Grand-daughter of the ſiſter, and the daughter of the aunt of the inteſtate are in equal degree.

A Conteſt aroſe in the *Eccleſiaſtical* court between the plaintiff and defendant for the adminiſtration to *Silveſter Andrews*, who died inteſtate; the plaintiff being grandaughter of his ſiſter; the defendant daughter of his aunt.

The pedigree ſtood thus.

Andrew Crook, the common anceſtor, had *Mary Andrews* and *Sarah Waſtfield*: *Sarah Waſtfield* had the defendant: *Mary Andrews* had *Silveſter* the inteſtate and *Rachael Thomas*, who had *Crook Thomas*, who had *Anne* the plaintiff.

The ſentence of the judge of the *prerogative* court was, that the defendant was one of the next of kin to the inteſtate and in equal degree with the plaintiff: whereupon he granted adminiſtration to the defendant, who was at full age.

The preſent ſuit in this court concerned the diſtribution of the eſtate.

For plaintiff was cited *Pool* v. *Wilſhaw*, *December* 9, 1708, in the *Exchequer*, where *F. Wilſhaw* having two ſons, *Francis* and *Benjamin*, by his firſt wife, and one ſon *Richard* by his ſecond wife, deviſed his perſonal eſtate between *Francis* and *Benjamin*, making his brother *Thomas* executor: *Francis* having received his ſhare died: and *Thomas* took adminiſtration during the minority of the other ſon: thereupon the plaintiff, mother of the teſtator's firſt wife and grandmother of *Francis*, preferred her bill for ſhare of the perſonal eſtate of *Francis*, with *Benjamin* the brother of the whole, and *Richard* brother of the half blood:

(334) blood: it was argued by *Civilians*, that the plaintiff was intitled to this ſhare, and ſtood in equal degree with the two brothers: but the court were of a different opinion, and decreed the plaintiff ſhould have no ſhare. On the foundation of which caſe the *Maſter of the Rolls* determined the caſe of *Norbury* v. *Richards* laſt term. The plaintiff here is not obliged to go up to the common anceſtor; claiming in a direct line from the mother of the inteſtate, and cannot go higher as the defendant muſt, in order to bring it down to her: and then the plaintiff is within three degrees, and the defendant four, according to their own computation: but brother and ſiſter are conſidered but as one degree; ſo that ſtill the plaintiff muſt be nearer; that being but three degrees; the inteſtate and his ſiſter *Rachael* making but one.

LORD CHANCELLOR.

The firſt queſtion is, whether I am not concluded, by what the *Eccleſiaſtical* court has done? And I think I am, and cannot determine contrary. That court is bound to grant it to the next of kin; and though the plaintiff is an infant, yet if nearer than the defendant, it muſt have been granted to ſome perſon during his minority: but both being in equal degree, that court has an election to which to grant it, and has given it to the defendant: then if I ſhould determine them not to be equal, but the plaintiff nearer, it is directly contrary to the foundation of this ſentence, which would make it erroneous, and to be reverſed. The conſequence of which would be, that by chuſing to come here for a diſtribution, you would change the rule relating thereto; for the ſuit might have been in the *Eccleſiaſtical* court for a diſtribution as well as here: and that court could not have contradicted the ſentence, by which adminiſtration was granted. Then I am equally bound thereby; being bound to determine by the ſame rules, like the caſe of legacy; for the rule of law, by which the deciſion is to be made, cannot be changed by chuſing the court, in which to ſue.

This court to determine by ſame rules as to diſtribution, and legacies as the *court eccleſiaſtical.*

But to enter into the merits; if it was open to me to determine contrary, according to the rules, by which this computation is to be made, the plaintiff is not nearer, but in equal degree. There are ſeveral rules of computing degrees; which are reduced to the maxims of the different laws, to which they relate. The rule of the *civil* law is, *quot*

The rules of computing degrees different in the civil from the canon law; our courts compute by the former

quot perſonæ tot gradus; computing up from *perſona propoſita*, the inteſtate, (whoſe eſtate is in queſtion) to the common anceſtor, and then down to the perſon claiming the relation to that inteſtate; and as many perſons as are in this aſcending and deſcending line (except the common anceſtor, who is not reckoned as one) ſo many degrees. The rule of the *canon* law is different: *viz. quo gradu diſtat remotior a communi ſtipite, eodem diſtant inter ſe.* Therefore they only compute up to the common anceſtor, not down again; and that perſon who has the ſmalleſt number of degrees to the common anceſtor, is the neareſt relation. The reaſon of eſtabliſhing that rule by the canoniſts was, what is mentioned by Sir *Joſeph Jekyl* in *Mentney* v. *Petty*, *Prec. Chan.* 593, *viz.* the nearer they bring the relation, the greater their trade of diſpenſations. But that rule of the canon law has been excluded in our courts, who compute by the civil law; as ſettled in *B. R.* In *Blackborough* v. *Davis*, 1 *Wms.* 41. It was objected, that there is no occaſion to go up to the common anceſtor, becauſe of the immediate relation between brother and ſiſter making but one degree. But I do not take that to be the rule of the civil law, but the common law in caſe of deſcents. But the civil law does not conſider the relation between brother and ſiſter as but one degree: which is proved from the 1 *J.* 2. 17. as appears from *Blackborough* v. *Davis*, *Sal.* 251. The reaſon of which act of parliament was that the mother ſurviving might carry away all from the brother and ſiſter. The ſtatute declares ſhe ſhall have but one equal ſhare with them; and directly contradicts that rule, that brother and ſiſter are to be conſidered but one degree. But ſuppoſing that not deciſive, and that brother and ſiſter ſhould be but one degree, that has never been allowed, but where the queſtion has been with the brother and ſiſter claiming, not where to bring in collateral relations: and that was the caſe of *Wilſhaw* in the *exchequer*, where the brother of the inteſtate excluded the grandmother. What is inſiſted upon is, that wherever brother and ſiſter meet in the courſe of computation, you ſhall ſtop there, and not compute higher: but it has never been ſo determined in computing among remote relations; which would in fact bring in the right of repreſentation, beyond what the ſtatute allows, *viz.* beyond brother's and ſiſter's children, among collaterals.

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The decree therefore muſt be for an equal diſtribution.

Pyot

Caſe 164. **Pyot *verſus* Pyot, *December* 6, 1749.**

Deviſe of real and perſonal eſtate in truſt for a daughter in fee, but if ſhe died before 21 or marriage, then to the neareſt relation of the name of *Pyot*.

(q) *DAME WITHRINGHAM* deviſed her real and perſonal eſtate to truſtees, their heirs, *&c.* firſt for her daughter *Mary Withringham*, her heirs, *&c.* for ever. *Proviſo*, that if that daughter ſhould happen to die before twenty-one, or marriage, then all the reſt and reſidue of her eſtate both real and perſonal in truſt to convey, aſſign, and ſet over the ſame to her neareſt relations of the name of *Pyot*; and to his or her heirs, executors, adminiſtrators or aſſigns for ever.

The daughter died under twenty-one and unmarried. At the death of the teſtatrix there were three perſons then actually of the name of *Pyot*, *viz.* a man and his two ſiſters, then unmarried, and another ſiſter originally of that name, but married at the time of making the will. At the time of the contingency's happening there was another perſon, who was heir at law to the teſtatrix, and of the name of *Pyot*, but more remote in degree than the others.

The daughter dies before 21 or marriage. The deviſe over is not void for uncertainty nor ſhall go to the heir, nor be confined to a ſingle perſon, but goes to the ſtock of the *Pyots* who were neareſt, and thoſe who had changed their names of *P.* ſhould notwithſtanding take with the reſt.

The heir at law inſiſted, this deviſe over was uncertain and void; ſo that upon the contingency happening it deſcended to the heir at law, 5 *Co.* 68. *b.* 1 *Ver.* 362, and *Taylor* v. *Sayer*, *Cr. E.* 742, though now denied to be law, ſhews the reaſons, the judges went on in determining wills uncertain. *Relation* cannot be properly *nomen collectivum*; for ſuch are words, that have no plural, as *ſtock*. *Heir*, though *nomen collectivum*, is not ſo in its firſt ſenſe; as held in *Archer*'s caſe. *Perriman* v. *Pierce*, 2 *Rol. Rep.* and *Pal.* 303, ſhews, that the judges, notwithſtanding their inclination to conſtrue a word plurally, yet where the teſtator has uſed it in the ſingular number, will not extend it further. But ſuppoſing it not void for uncertainty, the heir at law is the perſon probably meant by *neareſt relation*. The teſtatrix had in view a ſingle perſon, and could not intend to give it to all her relations. *Chapman*'s caſe, *Dyer* 333. ſhews that a deviſe to the family or *Stock* goes to the heir;

(q) Deviſe to Truſtees to inveſt in ſtock, and pay dividends to teſtator's ſon for life, and after his deceaſe to his eldeſt ſon and his heirs for ever, and in caſe of their death without iſſue, to his neareſt relation for ever, held a good deviſe, and the neareſt relation at the time of the event happening took. 1 Brown, 293.

heir; and this will is very accurate except in this place; and if not meant to tie it up to a ſingle perſon, it would have been mentioned ſo.

Next on a ſuppoſition of its not being void, the queſtion was, who were the perſons to take under that deſcription? Whether the ſiſters, who both married before the contingency happened, on which the deviſe over took effect, ſhould be let in with the plaintiff their brother; the contrary being inſiſted on for the plaintiff, becauſe this deviſe muſt refer to the time of the contingency's happening, when they were not of the name of *Pyot*; and *Jobſon*'s caſe, *Cr. E.* 576, and *Bon* v. *Smith*, *Cr. E.* 532 were relied upon.

LORD CHANCELLOR.

This is a ſort of ſcramble for the eſtate, and ſome difficulty ariſes, from what is inſiſted on by the anſwer of the perſons claiming under the ſame general right with the plaintiff; giving colour to the argument of the heir at law from the uncertainty. This limitation differs much from *Jobſon*'s caſe: that being a deviſe in tail, remainder to the next of kin of his name; which was a veſted remainder. This is a deviſe in fee, upon which no remainder could be limited, but determined on a contingency; which if in a reaſonable compaſs of time, as this, is allowed. A deviſe is never conſtrued abſolutely void for uncertainty, but from neceſſity. Therefore if one deviſes an eſtate to his ſon, and he has ſeveral ſons, and has not pointed out which; that is uncertain, and goes to the heir at law unleſs it could be conſtrued *eldeſt ſon* by way of eminence; (337) which would be the ſame thing; the eldeſt being heir at law. So in other caſes; as in 1 *Ver.* 362; which was abſolutely uncertain. But yet if there is a poſſibility to reduce it to a certainty, the deviſe is good. As a deviſe to his ſon *John*, having two of that name; courts of law, although they adhere to words of the will as much as poſſible admit an averment, to determine which the teſtator meant, which ſhews that every court of juſtice, law, or equity, leans to make a conſtruction if poſſible, *ut res magis valeat.* Then the queſtion is, whether there is ſuch uncertainty in this deviſe over? and if there was a neceſſity to take this to relate to a ſingle perſon it would be ſo; as there are ſeveral in equal degree of the name of *Pyot:* but I do not take it ſo; *Relation* is *nomen collectivum* as much as *heir* or *kindred.* A deviſe to *A.* and the heir-male of his body is 1 *Co.* 66. an

an eſtate tail; ſo held lately in *B. R.* It is true, it was held otherwiſe in *Archer*'s caſe, but that was upon another ground; for if it was only on the point of the ſingular number, it would have been an eſtate of inheritance. Suppoſe it had been to the neareſt kindred of the name of the *Pyots*; that is the ſingular number: and I admit, that word is uſed as *nomen collectivum* oftner than the other, there being no plural to it, (though I have ſeen it uſed in the plural in incorrect writings:) in common parlance, *Relation* in the ſingular number is uſed as *nomen collectivum*, in the ſame ſenſe as *kindred*; and no difficulty ariſes from the words *his* or *her* in this caſe, any more than where the word *heir* is uſed. But this is a truſt of both real and perſonal eſtate: and ſuppoſe this had been a deviſe of perſonal only; all thoſe perſons who are in equal degree of relation, of the name of *Pyot*, would be intitled to take equally: and the court would have properly taken into conſideration, what would be the rule of diſtribution. Then the court being upon a queſtion of conſtruction who are the perſons deſigned, the involving the perſonal in the ſame truſt and deviſe, is a circumſtance determining the conſtruction as to the real; affording a proper key to find out who are the perſons deſigned to take under this deſcription; for the teſtator muſt have had but one intention. As to *Taylor* v. *Sayer* it is directly contrary to law: and I will lay but little weight on the reaſoning in that caſe, to ſupport a reſolution which is wrong.

The next queſtion brings into conſideration another perſon, not before the court, *viz.* the ſiſter marries at the time of making the will; which is the great difficulty what decree I ſhall make *. I am not quite ſatisfied with the reſolution of *Jobſon*'s caſe, and think it a very odd one. In ſuch a deviſe there is no regard had to the continuance of name; but that caſe differs from the preſent. The remainder there to the next of kin of the name, was not a contingent limitation over upon a fee deviſed precedent: (338) nor was it a contingent, but a veſted remainder; and therefore referred to the time of making the will: whereas in this caſe, the deſcription of the perſon muſt refer to the time of the contingency happening, *viz.* ſuch as at that event ſhould be her neareſt relation of the name of *Pyot*. Then taking this to be *nomen collectivum*, as I do, there is no ground in reaſon or law to ſay, the plaintiff ſhould be the only perſon to take: becauſe there is no ground to conſtrue

* The parties conſenting removed the difficulty of her not being made a party.

ſtrue this deſcription to refer to the actual bearing the name at that time, but to refer to the ſtock of the *Pyots*. If it refers to the name, ſuppoſe a perſon of nearer relation than any of thoſe now before the court, but originally of another name, changing it to *Pyot* by act of parliament: that would not come within the deſcription of neareſt relation of the name of *Pyot*; for that would be contrary to the intention of the teſtatrix; and yet that deſcription is anſwered, being of the name of *Pyot*; and perhaps nearer in blood than the reſt. Then ſuppoſe a woman nearer in blood than the reſt, and marrying a ſtranger in blood of the name of *Pyot*; that would not do: and yet at the time of the contingency ſhe would be of the name. In *Jobſon*'s caſe, and in *Bon* v. *Smith* (which was a caſe put at the bar by Serjeant *Glanville*, which was often done in thoſe times, but cannot be any authority) it is *next of kin by name*; which is a mere deſignation of the name, and is expreſſed differently here. It may be a little nice; but, I think, *the Pyots* deſcribe a particular ſtock, and the name ſtands for the ſtock; but yet it does not go to the heir at law, as in the caſe in *Dyer*; becauſe it muſt be *neareſt relation*, taking it out of the ſtock; from which caſe it alſo differs, as the perſonal is involved with the real; and it was meant, that both ſhould go in the ſame manner; and ſhall the perſonal go to the heir at law? Then this plainly takes in the plaintiff and his two ſiſters unmarried at the time of making the will, although married before the contingency. And I think the other ſiſter, not before the court, is equally intitled to take with them; the change of name by marriage not being material, nor the continuance of the name regarded by the teſtatrix.

This is like that caſe in the *Houſe of Lords*, which was a deviſe on condition of marrying a perſon of his name. The lady married a perſon, who changed his name to that in the will: the *Houſe of Lords* held, this voluntary change was not within the benefit of the bequeſt, nor a performance of the condition of the will.

Caſe 165. Gammon *verſus* Stone, *December* 7, 1749.

Tender and refuſal. Aſſignment of the bond by the obligee not to be inſiſted on by the ſurety who pays the money. Poſt. 2 Auguſt, 1754.

AN action being brought againſt the repreſentatives of a ſurety in a bond, they brought a bill againſt the obligee, ſuggeſting that they had applied to the defendant to receive his money, and had made a tender of it, and that the only terms, they inſiſted on, were that he ſhould aſſign over the bond to them with a letter of attorney impowering them to uſe his name upon their giving him an indemnity: which he refuſed. The bill therefore was, that he might receive his money, and that they might have the bond aſſigned, and liberty to make uſe of it.

It was proved, that two bags were brought by the plaintiffs, and the money began to be counted out; but that the defendant who had agreed thereto before, changed his mind, ſtopped them, and ſaid, he would not take the money upon the terms, on which it was offered by them; though he ſaid, he had no objection to the ſecurity, and did not doubt but that the money was right.

LORD CHANCELLOR

Was of opinion, that the plaintiffs had no right to expect the aſſignment; and that it was not to be inſiſted upon, becauſe it was quite uſeleſs.

It was then inſiſted for the plaintiffs, that they ſhould not pay, but ſhould have coſts; for that a legal tender was made of the money to the defendant before the action brought: and the refuſal of the aſſignment of the bond was a ground of coming into this court.

LORD CHANCELLOR.

Coſts. It muſt be an actual tender to excuſe coſts

The expence of this ſuit is owing to the plaintiffs, who have miſtaken their way. If a legal tender was made, they need not come into this court; for it might be pleaded at law with an averment of being always ready. If a tender is not legal, a court of equity will not ſupport it; nor ſupply a defect of a tender againſt a rule of law, unleſs perhaps where fraud is uſed to prevent it. Then the plaintiff is in the common caſe, on payment of principal and intereſt; which carries the coſts with it: there being few caſes in this court where it does not do ſo. There are ſeveral caſes of

of mortgages, in which though very reaſonable propoſals may be made, yet if no proof of an actual tender, the court on a bill to foreclose never refuſes coſts.

(340)

Buller *verſus* The Biſhop of *Exeter*, *December* 12, 1749. Caſe 166.

Baron Clarke in the abſence of the *Maſter of the Rolls.*

The privilege of the elder ſiſter to preſent firſt in turn goes to her aſſignee.

THE eſtate of an advowſon deſcended to two daughters as parceners; the church became vacant twice in their time, and both joined in preſentation: the eldeſt marries, ſettles her own eſtate in the common way, and dies: the other daughter before it became vacant again, marries and makes a ſettlement of her part. A vacancy happening, *Buller*, the huſband of the eldeſt, intitled to her eſtate as tenant by *curteſy* or under the ſettlement, claims as in her turn, and preſents; but the biſhop objects thereto, becauſe the younger ſiſter and her huſband, claiming an equal right to preſentation as tenants in common, did not join: ſo that there being a litigation, he was willing to preſent the perſon appearing to have right in courts of law.

It was now made a mere point of law, whether the alternate turn of preſentation among parceners continued to the grantee: *i. e.* whether the perſons, to whom conveyed, are to be conſidered as enjoying the ſame privileges of preſenting in turn, as the ſiſters and parceners, if they had their own eſtate.

Baron CLARKE.

I have always thought, that the many alternate preſentations in this kingdom muſt ariſe from eſtates deſcending in parcenary, where advowſons are upon them: it is the only eſtate, I know, which in courſe, and by operation of law only, falls on ſeveral perſons making but one heir; without the intervention of conveyances by will, or otherwiſe, of the owner of the eſtate, which makes it, although in ſome inſtances partaking of a tenancy in common, different from that and from a jointenancy, which are made by conveyance, and deſcendible in a different manner. An advowſon is a particular ſort of an eſtate ſo deſcendible; and as it is impoſſible to be divided into parts, ſo as to be enjoyed ſeparately, as it is natural to follow the

courſe that has been practiſed, that each parcener ſhould have a turn to preſent, and to prevent confuſion begin with the eldeſt. And in all the caſes mentioned out of *Bro. Ab.* and *F. N. B.* Where diſputes aroſe, whether the alienee of the elder ſiſter ſhould have the ſame privilege, or whether it ſhould go to the next ſiſter; it is determined in favour of alienee. They never were conſidered as tenants in common afterward; but every one preſented in
(341) turn: agreeable to *Cr. El.* 19, and 2 *Inſt.* 365: otherwiſe there would be great confuſion; for the elder, either before preſentation alienating the eſtate, would make all tenants in common, or waiting till her turn, then making alienation, and ſo defeat the other parceners. Therefore the alienation of the eſtate by a parcener does not for this purpoſe make them in the caſe of original tenants in common; but it ſtill partakes of the nature of parcenery. Then what *Buller* inſiſts on is right: it is agreed, it would be the turn of his wife, if alive; ſo that the alienation makes no difference. And if a precedent is wanted, the words of 2 *Inſt.* are, that the privilege not only deſcended to the heir but to the aſſignee of each.

Caſe 167. Walmſley *verſus* Child, *December* 11, 1749.

Notes payable to *A.* or bearer and ſaid by *A.* to be loſt; and a bill ſeven years afterwards by repreſentative of *A.* inſiſting on payment; but no affidavit of the loſs, nor offer of indemnity: the plaintiff muſt be left to an action at law.

THIS cauſe came upon bill and anſwer; and the queſtion was, what equity the plaintiff was intitled to upon the caſe ſtated, and facts admitted therein, which were theſe.

Charles Walmſley, in *April* 1742, lodged money in the ſhop of Mr. *Child* and *Company*, for which he took notes payable to himſelf or bearer. About nine days afterward he came to the ſhop and acquainted them, that he had loſt the notes; believed his pocket was picked of them at play, and imagined he knew the perſon who did it; therefore deſired, they would pay him the money, as the notes were not negotiated, but only loſt. They anſwered, they were ready to do ſo, if he complied with what was uſual in all ſuch caſes, *viz.* to enter into a bond with ſureties to indemnify them. He ſubmitted thereto; but never did it, adverting them for ſeveral days in the papers: and ſo it reſted till his death.

This bill was brought by his widow and adminiſtratrix, inſiſting, that theſe notes muſt be taken to be loſt, and that after this length of time there is a preſumption of it: and that

that the defendant had no right to inſiſt on ſecurity againſt ſo plain a demand. The plaintiffs having a clear right, muſt have a remedy; and therefore proper to come here, the accident of loſs giving this court juriſdiction. The defendant runs no riſk therein. No action could be brought againſt Mr. *Child* by a perſon finding the notes; for the legal right being veſted in *Walmſley* and no other, his name, or the name of his repreſentative muſt be made uſe of in ſuch action: and then a releaſe by the repreſentative reciting the accident, would be a bar to that action. But the ſtatute of limitations has barred; which might be pleaded in an action at law by ſuch a bearer, or in a bill in equity; for goldſmiths notes are within the ſtatute of limitations as well as bills of exchange. Nor does this caſe concern promiſſory notes only, but all other deeds and writings. Theſe notes are as caſh; and not to be preſumed, that any perſon having them would lie by as in the caſe of a bond, which carries intereſt. In a bill for payment of a legacy the court does not now require ſecurity to be given, though the practice was ſo formerly; and yet there may be debts ſtanding out.

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For defendant. Theſe notes are undertaken to be paid by the goldſmith or the banker to the bearer, whenever demanded; ſo that they never raiſe a credit in their books with the perſon named, who is not conſidered as intitled thereto, unleſs he has the notes to produce; without which he has no right at law; for he cannot bring an action for ſo much money had and received to his uſe; becauſe from the nature of the contract, the bearer has a right to demand it. Theſe notes by conſtant uſage are as caſh; and as ſuch paſſed in a late caſe of a deviſe of all the money in his houſe. Then it is of conſequence to this kind of credit and to the public, who receive advantage therefrom, that the faith and value of them ſhould be kept; and though ſtopping payment is not the ſame as an act of bankruptcy, it might be followed therewith, and hurt the credit of the bank. The ſale of ſuch a note is an abſolute ſale of all the property of it, *Comyns* 57; ſo that there is no want of aſſignment or conveyance thereof: but the very delivery over by purchaſe or gift paſſes the material property; and from the terms and import of the contract, the defendant is not bound to pay but to the bearer. Then it is contradictory to the rules of law, to ſay the vendor by any act can alter the right of vendee: the releaſe therefore will be no avail. As little will the ſtatute of limitations be any ſecurity to the defendant, this caſe not being within

it;

it; for the notes not being for value received, which words are never inſerted in common goldſmiths notes, but payable on demand, the ſtatute of limitations does not run till demand and refuſal: nor can there be intereſt by way of damages till then. But the ſtatute of limitations is ſtopped by acknowledgment of the debt, which the defendant has all along done; and will take it out of the ſtatute. If then a riſk muſt be run, the plaintiff ought rather than the defendant to run it, from the groſs neglect at leaſt: nor is there any affidavit of the plaintiff's not knowing what is become of them. The defendant ſwears by his anſwer, that notes have been brought to him after thirty years, which he has paid; and that upon inquiry of the moſt eminent bankers, the conſtant cuſtom is, never to pay where the note is not produced, but on ſuch terms; all which muſt be taken to be true, therefore it is not unreaſonable, eſpecially as a perſon coming into equity muſt do equity. In *Glyn* v. *The Bank of England*, *November* 16, 1741, after the death of *Nicholas Harding*, a liſt of bank notes in his own handwriting were found, ſome marked as received by him, others as not received: the executors applied to the bank for the latter; and offered to have
(343) the money laid out in ſecurity to wait the event; the bank ſaid they never did that, but where it appeared, that the perſon who applied was owner, which did not appear; for they were common bank notes, and nothing but that liſt to ſhew his property. Your *Lordſhip* held it a hard caſe, that the bank ſhould retain this money, and ordered it to ſtand over, for the bank to conſider of it; and 18th *December* directed an iſſue, to ſee whether they were his property or not. *Terceſe* v. *Geray*, *Finch Rep.* 301, is applicable: ſo are the caſes of inland bills of exchange upon the ſtatute 9 and 10 *W.* 3. 17.

LORD CHANCELLOR.

Two queſtions ariſe on this caſe. Firſt, whether it appears clearly, that the plaintiff has right either in law or equity to the money due on theſe notes. Then ſecondly, ſuppoſing ſuch right, whether ſhe has purſued proper remedy? It is certainly of great conſequence to the credit and general negotiation of notes of this kind; and therefore whatever circumſtances of compaſſion and difficulty upon the plaintiff, the court muſt conſider the caſe in general, and not be induced lightly to carry this caſe ſo far, as to make the defendant riſk a ſecond payment.

As

As to the firſt queſtion, the original right appears clearly by the anſwer to have been in *Walmſley*. The terms, upon which the defendant inſiſts, being uſual, it is certainly a reaſonable rule to go by: but whether they have a ſtrict demand thereto in all caſes is another conſideration: the defendant admits, that *prima facie* the legal right to recover this money appears to be in the plaintiff: and his objection from the import of the contract, being payable to bearer, and no want of aſſignment, *&c.* is carrying it too far to ſay in any caſe; for undoubtedly one's having loſt his note or ſecurity, is no reaſon why he ſhould loſe his debt. But a note loſt in that manner is a ſtrong reaſon why the defendant ſhould hold his hand, and receive the fulleſt ſatisfaction, that it would never be demanded of him. Where it is payable to him or bearer, the bearer of the bill or note has not ſuch a property, as that he can maintain an action at law in his own name, but it muſt be in the name of the payee or his repreſentative. But then it muſt be conſidered in another light. The contract of the party is, that it ſhould be paid to the bearer of the bill; it is a promiſe on the part of drawer of the note to pay to the perſon named or bearer; therefore the bill muſt be brought, whoever demands the money, and the import of the agreement on the part of the payee is, that payment, to whoever brings the bill or note, ſhall be a diſcharge, and may be given in evidence as againſt him; which is a very material conſideration in this caſe: and therefore it behoves the defendant to have abſolute certainty, or ſee the note, before he pays. If upon payment, a releaſe is (344) given of all demands on theſe notes, no action could be but in the name of *Walmſley*, and this releaſe may be pleaded: ſo if a judgment at law by *Walmſley*; that may be pleaded at law, and would be a diſcharge in another action. But a conſideration occurs, that if any perſon came to theſe notes for valuable conſideration, though they kept them in their hands for ſeven years, and afterward brought a bill, whether this releaſe would do in ſuch caſe? All the circumſtances would be then conſidered. *viz.* that the property paſſes to the bearer of them, and how long from the courſe of buſineſs ſuch notes may lie out; that they may go to all parts of the world, and may lie out ſeveral years; and it highly concerns the credit of them not to refuſe payment. Then if a bill is brought by a perſon proving he gave valuable conſideration of them, and a releaſe only ſhewn upon payment and ſuggeſtion of loſs without proof of the loſs, would that be a defence? It would be a very precarious one. If actual proof of their being loſt or

ſtolen,

ſtolen, it would be a different conſideration: but here is no proof, the publiſhing the advertiſements is none, nor a preſumption. Then what is ſworn by the anſwer, is material, and muſt be taken to be true, as not replied to, of the account given of it by *Walmſley* to the defendant; which was a ſtrong reaſon for the defendant to ſtop his hand; for *Walmſley* ought to have purſued the perſon ſuſpected. How is this caſe altered by length of time? Seven years are paſſed which would at law create a bar: but not here; becauſe of the confeſſion and offer of the defendant to pay on terms; which would take it out of the ſtatute of limitations; for though it was long doubted whether a bare acknowledgment to pay would do ſo, it is not now diſputed; and it is alſo ſworn by the anſwer, that theſe notes have been brought on them after thirty years.

Acknowledgment to pay takes the debt out of *Stat.* of limitations.

The next queſtion is, whether the plaintiff, ſuppoſing ſhe has right, has purſued a proper remedy? And I am of opinion, ſhe has not purſued ſuch a remedy, as ſhould finally determine the caſe between the parties. It is ſaid, ſhe comes properly to be paid, as upon the loſs of the notes. It is certain, that in caſe of a legal demand, as the preſent is admitted to be, there is no other rule of evidence upon the payment of money upon a loſs, than there is at law, but that in all caſes at law, except in one, the party may be remedied on proof at law, juſt as he may here, provided reaſonable evidence of the loſs; (r) courts of law not requiring any more than courts of equity, ſtrict and poſitive evidence of the loſs; which, as it is generally occaſioned by negligence, is ſeldom capable of being given: but both admit evidence ariſing upon circumſtances, and upon that, the party is intitled to recover. * But there are caſes, upon which you may come into equity on a loſs, though remedy may be at law; and one is clear upon a bill for diſcovery. But if you come into equity not only for diſcovery, but to have relief, on the foundation of loſs, that changes the juriſdiction. And there are but three caſes in which you are intitled to do that; in every one of which you are obliged to annex an affidavit to the bill to prove the

Where one may come into equity upon a loſs notwithſtanding a remedy at law.

(r) Evidence the ſame in equity as at law, as to a matter of fact. 2 Vol. 41.

* In general though a legal demand cant be turned into an equitable one, yet in a demand of aſſets, plaintiff may come in here for ſatisfaction, though he has a remedy at law, to avoid the inconvenience of doubly ſuing, as he is intitled to an account of aſſets in at this court, and then, inſtead of ſending him to law for ſatisfaction, he will get complete remedy at once, 2 Veſ. 106.

the loſs. If the deed or inſtrument upon which the demand ariſes is loſt, and you only come for diſcovery, you are intitled thereto without affidavit: but if relief is prayed beyond that diſcovery, to have payment of the debt, affi- (345)
davit of the loſs muſt be annexed; for that changes the juriſdiction. If the deed loſt concerned the title of lands, and poſſeſſion prayed to be eſtabliſhed, ſuch affidavit muſt be annexed. Another caſe is of a perſonal demand, where loſs of a bond, and a bill in equity on that loſs to be paid the demand: there a bill for diſcovery will not be ſufficient, but it muſt be to be paid the money thereon; but an affidavit muſt be annexed. The reaſon of the difference between a bond and note is, that in an action at law a *profert in cur.* (s) of the bond itſelf muſt be made, otherwiſe *oyer* cannot be demanded by the defendant; and if *oyer* is not given, the plaintiff cannot proceed. But that is not neceſſary in the caſe of notes; no *oyer* is demanded upon them, the proving the contents being ſufficient; and nothing ſtanding in the plaintiff's way. Another caſe, in which you may come into this court on a loſs is, to pray ſatisfaction and payment of it upon terms of giving ſecurity. In an action at law, the plaintiff might offer, but the defendant could not be compelled to take, but in equity, that would be a conſideration, whether they were reaſonable. That was the caſe of *Tereſy* v. *Gory*, as Lord *Nottingham* has taken the name in an authentic record I have of it; which was *Eaſter* 28 *C.* 2. where a bill of exchange was drawn on the defendant, and indorſed in the third place to the plaintiff, by whom the bill was either loſt or miſlaid, as appeared by the affidavit annexed. And the bill prayed that the defendant might be decreed to pay the plaintiff the money, as laſt indorſee, according to the acceptance; the plaintiff firſt giving ſecurity to ſave the defendant harmleſs againſt all former aſſignments; which was ſo decreed, but without damages and coſts. In a book called *Finch*'s Reports, 301, the decree is ſomewhat larger, and the acceptance of the defendant was after the third indorſement, as it is in that book. though not ſo in the manuſcript report; and indeed I do take it to be as in the book; and then there is no doubt of the plaintiff's right: but if that be material, it ſhall be inquired into: in that caſe if the plaintiff could at law prove the contents of his bill, and the indorſement, and the loſs of it, he might have brought his action at law upon that bill without coming into this court: but he was apprehenſive, the courſe of trade might ſtand in his way at law, and therefore came into

Where affidavit of the loſs neceſſary.

Difference in action at law upon the loſs of a bond and a note.

(s) 2 Vol. 41.

into this court upon terms, ſubmitting it to the judgment of the court, whether they were not reaſonable. So was the caſe of *Glyn* v. *The Bank of England*, the plaintiff ſubmitting to give ſecurity; which was, what a court of law
(346) could not take into conſideration: whereas the preſent expreſsly oppoſes oppoſes the giving ſecurity. The reſult therefore as to the remedy is, that it is a bill in this court to have a decree for a plain legal demand, if the plaintiff is in the right, without other circumſtances; and no affidavit annexed to the bill of the loſs of the loſs of theſe notes; and no evidence beſide preſumption. It may be ſaid, that the rule of this court for annexing an affidavit to a bill is in the caſe of loſs of a deed; and that in general is ſo: but I ſee not, why it ſhould not be required in the caſe of any inſtrument, if you come into this court to change the juriſdiction, which is the ground upon which the court goes, and then in the caſe of the loſs of a note it is the ſame. And in *Tereſy* v. *Gory*, the bill was ſo brought; an affidavit being annexed, although ſecurity offered; and weight was laid thereon by Lord *Nottingham*. That this is a legal demand, notwithſtanding the loſs of the note, is clear, and perhaps the eaſieſt way that can happen; for the plaintiff may go two ways to work. If the plaintiff can prove the loſs, ſhe may declare on the notes: but to get rid of the proof, ſhe may bring an *indebitatus aſſumpſit* for money had and received, *&c.* for payment into the defendant's ſhop is admitted. The reaſon of making the ſtatute 3 and 4 of *Anne* aroſe from ſome determinations in the beginning of her reign by *Holt C. J.* that no action could be maintained on a promiſſory note, nor declaration thereupon, *viz. Clarke* v. *Martin*, and *Potter* v. *Pearſon*, 1 *Sal.* 129; which caſes produced the act, as the act itſelf recits: but that act of parliament did not alter, but that ſtill an *indebitatus aſſumpſit* may be brought, and the note given in evidence, or proved if loſt; nothing ſtanding in the way, as there would in the caſe of a bond. Then ſuppoſing an action by the plaintiff againſt the defendant for the money, which is admitted to be paid into the ſhop, what will ſtand in her way of recovering, but what ought to ſtand in her way? It will then be for the conſideration of the court, how far the courſe of trade ought to ſtand in her way; and to that remedy I ſhall leave the plaintiff. As to the act relating to the inland bills of exchange, it deſerves to be taken notice of. Before the *Stat.* 9 and 10 *W.* 3. there was a great difficulty about recovering upon ſuch bills. This matter therefore being uncertain, the merchants procured that act; the nature of the

the proviſion thereby being, that if an inland bill of exchange, payable to himſelf and never indorſed, be loſt, and he comes to the perſon drawing, he is not bound to pay, without ſecurity given in caſe the bill be found: and yet what danger could there be in general? For if a bill is payable to *A.* and *A.* makes affidavit and ſhews the loſs, and the bill never indorſed, there is little danger; becauſe it is common among merchants to draw ſeveral bills, *viz. pay the ſecond, firſt not paid*, which is a ſecurity, and is the conſtant courſe of merchants. Then conſider the intent of the 3 and 4 *Anne*, relating to promiſſory notes: the title of the act is to give the ſame remedy, and to make theſe notes of the ſame effect, as inland bills of exchange. And this practice of the bank and the goldſmiths, has taken riſe from the proviſion made in that act of parliment; for it is equally dangerous to them to pay, without having the promiſſory note delivered up, as in the caſe of the inland bills. Then if I am to act by my diſcretion, I ſee no ground to depart from that: this is not a caſe, in which there is a probability of great hazard: nor do I think, the defendant, if it was not for the ſake of the precedent, would lay ſo great weight upon it; for from the length of time it is natural to think, there is no riſk. But if there is any, I am not to let the defendant run it: and there is a ſuſpicious part of the caſe, from what *Walmſley* ſaid and did. (347)

Upon the whole therefore, the plaintiff muſt bring an action at law for the money; the bill ſhall be retained; and then the matter will be properly tried, and a court of law will take into conſideration, how far the courſe of trade and manner of negotiating theſe notes are to go. It is now eſtabliſhed, that if a goldſmith's note is taken, and kept beyond three days, and the goldſmith breaks, it is the party's own fault for keeping it longer, though there is no act of parliament concerning that: this therefore is proper to be determined by a jury, as that was.

For plaintiff. It has been doubted, whether the plaintiff can maintain an action: therefore an iſſue ought to be directed, ſo as to clear it of all collateral matter.

LORD CHANCELLOR.

I ſee no doubt of maintaining the action: nor is there any thing in the anſwer that will bar it.

But

But if the plaintiff does not proceed in the action for this money, let the bill be dismissed with costs.

Case 168. Schellinger *versus* Blackerby, *December* 16, 1749.

Office liable to creditors; and 6 shillings and 8 pence per day by warrant from the crown part of the office.

IT having been determined by his *Lordship* that the office of taking care of the Palace and House of Lords, granted to *Blackerby*, his executors and administrators, for thirty-one years, should be subject to his debts, it was referred to the Master to see, what were the profits of that office.

On exception to the report, the question was, whether a fee of six shillings and eight pence a day (which was an allowance made by the Lord *Chamberland's* warrant to *Blackerby* for the purposes of making clean and sweeping the Royal House and Palace, and the chimneys, removing (348) and placing the chairs, forms, *&c.* in the House of Lords) should be held as part of the profits of the office; it being said to be a voluntary allowance of the Crown by way of satisfaction for particular expences in paying labourers, *&c.* and that it may be varied; therefore no part of the office.

LORD CHANCELLOR.

It would be very extraordinary, if this should not be subject to the creditors satisfaction. In the bankrupt acts, offices are expresly named as subject thereto. It is clear, that this six shillings and eight-pence a day is part of the office and liable to creditors. It is true it may be varied; but is not pretended but that it is an allowance paid time out of mind; nor shewn to be a new and particular bounty: nor objected that it has not gone with the office. If indeed it could be said to be money laid out of his pocket, there would be no ground to consider it as part of the office: but it is not so. The words of the grant are *cum omnibus aliis Vadiis, feodis, proficuis, commoditatibus*; which must take in something more than what are particularly there mentioned; and there is nothing more than this to be taken in. It was intended to be so; and the words are proper for it. If not thus considered, it would be vain for a court of equity to hold any office to be subject to creditors; for there are several offices, whereof the greatest parts arise from a particular warrant from the Crown; which

which if ſtruck off, the other parts of the office would be worth nothing.

LORD HARDWICKE LORD CHANCELLOR.
Lord Chief Juſtice LEE.
Lord Chief Baron PARKER.
Mr. Juſtice BURNET.

Ryall *verſus* Rowles, *January* 27, 1749-50. Caſe 169.

Mortgagees of goods, &c. permitting bankrupt to continue in poſſeſſion, order and diſpoſition, have no ſpecific lien againſt general aſſignees under the commiſſion.

WILLIAM HARVEST, a trader within the ſeveral ſtatutes concerning bankrupts, in *June* 1732, borrowed from *Benjamin* and *Joſeph Tomkins* 1500*l.* and as a ſecurity conveyed and aſſigned his dwelling-houſe and brew-houſe at *Kingſton*, and all the coppers and utenſils in trade belonging thereto, by way of mortgage, ſubject to redemption. He afterward took *Jonathan Stephens* into partnerſhip with him; and in leſs than a month after the partnerſhip, *December* 22, 1736, made a ſecond mortgage to *Potter* in truſt for *Jonathan Stephens* of his moiety of not only the utenſils, but the ſtock in trade, debts, profits, &c. for ſecuring a ſum of money, then lent to him by *Jonathan Stephens*, and any future ſums that ſhould be lent. *December* 10, 1737, he made a third mortgage, of the ſeventh part of his undivided moiety af all the ſtock in trade, utenſils, debts due or to grow due, to Sir *James Reynel*. *April* 24, 1738, he made a fourth mortgage of the ſevnnth part of his undivided moiety, with the ſame deſcription, to *Skip*. *September* 7, 1738, he made a fifth mortgage to *Jonathan Stephens*, for ſecuring to him 2000*l.* which *Stephens* had paid to one *Baugh*, who had the original mortgage on the freehold eſtate: the real premiſſes which were conveyed by way of leaſe to *Tomkins*, having been mortgaged to *Philip Stone* in 1725, and aſſigned to *Baugh*, who aſſigned to *Stephens* upon being paid the 2000*l.* He afterward made a ſixth mortgage to *George Harveſt* his ſon, of the ſeventh part of his undivided moiety of the partnerſhip, ſtock in trade, debts, utenſils, and profits, in conſideration of a ſum of money lent.

(349)

Notwithſtanding theſe ſeveral mortgages, he continued in poſſeſſion of the utenſils and ſtock in trade as before; altered,

(t) 1 Atk. 165. S. C. 1 Brown, 99.

altered, diſpoſed and mortgaged them as his own, and received the debts in partnerſhip with *Stephens*, without any controul from any of the mortgages till 1740, when he failed and became bankrupt.

Then the aſſignees and mortgagees inſiſted on the right to the ſeveral goods, ſtock, *&c.* compriſed in their ſeveral aſſignments, in oppoſition to the general creditors claiming under the commiſſion.

The cauſe was heard before *Lord Chancellor*, the *Seals* after *Michaelmas* 1747; and it being a new caſe, his *Lordſhip* ordered it to be argued by two counſel on each ſide, *aſſiſted* by the *Judges*, upon the queſtion whether all, or any and which of, theſe mortgages came within the *Stat.* 21 *J.* 1. 19, particularly the latter part of the tenth, and the whole of the eleventh ſection, or not? It was argued *February* 24, 1747-8.

Solicitor General and Mr. *Noel*, for the *Aſſignees under the Commiſſion.*

The queſtions upon the conſtruction of this ſtatute are two. Firſt, whether any conveyance of goods or chattels by way of mortgage, or with condition of redemption, is within that ſtatute? The ſecond, if the court ſhould think ſo, whether any of theſe ſix mortgages are within the clauſe as to any of the goods compriſed therein; the conſequence of which is, that they muſt be as creditors under the commiſſion, and not be preferred to the other creditors?

(350) The firſt will depend on the true conſtruction of the act itſelf; to find out which three things are to be reſorted to. The circumſtances at the time of making the act; for to them the law was adapted: the remedy intended, and the miſchief deſigned to be prevented thereby: and judicial explanations of the act ſince. It will appear, that ſome conditions of redemption are within this clauſe, and that it was calculated for this. When this act was made, fraudulent conveyances were ſufficiently guarded againſt by 13 *Eliz. c.* 5, 7. *Twine*'s caſe 3 *Co.* 80, upon the conſtruction of that act, was conſidered ſo ſtrongly within it, that the party was puniſhed criminally: and particular proviſions are made by that ſtatute in caſe of bankruptcy. Fraudulent conveyances then, being provided for before, were never intended by the act now in conſtruction: but the

the thing intended was an equal diſtribution amongſt creditors; which was very unequal, ſome creditors getting prior liens ſeveral ways; as by bond, judgment, *&c.* to take away which priority, unleſs where ſatisfaction by execution and recovery before the bankruptcy, was the intention of the act; and to reduce creditors, who had truſted the bankrupt generally, to equality. Another way creditors had of gaining a priority, was by pledged goods; and after that a new way, by conveyance without delivery of the goods. Anciently, as appears from the *year books*, 5 *H.* 7. *f.* 1. Delivery was neceſſary to a ſale; and was often done by parol: the pledge muſt be delivered over to the pawnee himſelf at the time of borrowing, otherwiſe no property veſted in him. But that doctrine was afterward exploded: as in *Yel.* 164. and 2 *Leon.* 30. *Clark*'s caſe, where the property was held veſted, though no delivery at the time. And *Owen* 124 held, that ſuch pawnee might aſſign over his property: ſo that wherever the conveyance was under hand and ſeal, it was not neceſſary to veſt the property by delivery of goods pledged: there is no real diſtinction between the words *mortgaging* and *pledging*; the firſt being generally applied to lands, the other to goods; and they are in effect ſynonimous terms. As to lands, the mortgagee holds by title; and the title deeds always are, or ſhould be in his poſſeſſion: but as to goods there is no hold, where the pawnor keeps them in his poſſeſſion. The *end* of the act therefore being to reduce creditors to equality, it is but reaſonable to put ſuch creditors, who took pledges and left them in the hands of the bankrupt or pledger, to diſpoſe of and alter them as he pleaſed, upon equality with other creditors; for the mortgagees give the bankrupt a general credit. Suppoſe a diamond pledged for a large ſum, and pawnor keeps poſſeſſion of it; if he ſells the diamond, as he may do the next day, the creditor muſt come in under a commiſſion. The inconvenience in allowing a preference in caſes of theſe ſecret conveyances, is greater than that of judgments, which are public and open: not that the act intended to reſtrain the pawning and ſelling goods generally: and there might be a ſale of goods where poſſeſſion could not be given; as of ſhips at ſea, and goods, and merchandiſe that are bringing home. Such conveyances then by way of mortgage are within the reaſon of the act: and the queſtion is whether within the letter? The word *convey* in the preamble extends to all conveyances in general, whether abſolute or by condition: mortgages of lands or goods are in this act called *conveyances*: and where a general word is mentioned

tioned to take in all, it is not uſual afterward to ſpecify particular words, which come after it. The miſchief recited in the preamble is material, *often happening*. It never was a frequent practice to buy goods abſolutely and to leave them in poſſeſſion of the vendor to do as he would with his own, which caſe never happens without fraud: and the preamble ſuppoſes a good conſideration, not upon fraud; againſt which caſe, if the legiſlature had intended a proviſion, it would have put it upon that. But they knew that would be void by 13 *Eliz.* and were therefore providing againſt conveyances by way of mortgage, the mortgagor keeping poſſeſſion and exerciſing all acts of ownerſhip. The enacting part is very carefully penned; and every word deſerves to be weighed: the goods muſt be originally the property of the bankrupt, and conveyed by him, and muſt continue in the order and diſpoſition of the bankrupt. It is objected, that mortgagee or grantee on redemption cannot be called owner or proprietor: but the act conſiders him as ſuch: the words take in all ownerſhips whatſoever; ſome for greater intereſts, others for leſs; and the pawnee or mortgagee is in point of law conſidered as proprietor, and may maintain *trover* upon it, although that action is founded in property. Such conveyance by pledge has been held to be good againſt extent of the crown, becauſe the property is altered. 3 *Bul.* 17 ſhews, that pawnee has a ſpecial property, ſo that no act of pawnor can affect it by outlawry or felony. So if a leaſe for years is made of goods, a *ſcire facias* for the king upon a ſubſequent outlawry ſhall not affect them till the leaſe ended. It is objected that the word *true* is added to *owner or proprietor*, and that mortgagee never was deemed ſuch; but *true* is never put in oppoſition to *ſpecial*, but *falſe*, owner, and ſo meant in this act. It is ſaid that mortgages are allowed and excepted out of the act; power being by another clauſe given to the commiſſioners or aſſignees to redeem: but though a trader may mortgage, his goods muſt be delivered to the mortgagee or in the hands of a third perſon, and not remain in mortgagor; beſide, that clauſe only gives the ſame power the aſſignees had before, in place of the bankrupt. As to judicial expoſitions upon this ſtatute ſince, it has been held, that the preamble ſhall be taken into conſtruction, and the enacting part controuled by it. So held by *Holt, Chief Juſtice* in *L'Apoſtre* v. *L'Plaiſtrier*, cited in *Wms.* 318.

(352) *Lee Chief Juſtice*, My account of that caſe is different from that in 1 *Wms.* evidence having been given of the alteration

teration of the diamonds by taking them out of the ſockets. It was held by the court, that offering to ſell generally was ſufficient evidence of offering to ſell as owner; but no judgment was given; it being adjourned for further argument, although the court ſaid, if this was not within the act, they knew not, what was. I had occaſion to cite this caſe before Lord *Raymond*, at *Guildhall*, and it was then ſaid, there was no determination upon it.

LORD CHANCELLOR.

I have ſeen another note of that caſe; and it appears to have been argued a ſecond time, when Sir *Edward Northey* took the diſtinction, that the enacting part was controuled by the preamble. Search was directed to be made for the rule; which was found; and this matter was determined *Paſ.* 9 *Anne*; but whether upon the point in queſtion or no did appear.

For the general aſſignees. In *Auguſt* 1744 *Ex parte Marſh*, his *Lordſhip* held, that plate in truſt for benefit of the wife was not within the ſtatute, not being of the bankrupt, or conveyed by him. The preamble then makes part of the enacting clauſe, and is the key to it, 1 *Wms*, 317; notwithſtanding the general act of parliament may take its riſe from a particular caſe; and ought to be conſtrued to prevent the miſchief, and advance the remedy. The queſtion of the mortgage of goods being within this act of parliament has been in judgment before. The caſe of *Stephens* v. *Sole*, *July* 5, 1736, which was ſolemnly argued, is in point. There *Wm Tappenden*, indebted to the plaintiff 1400*l.* for ſecuring payment thereof mortgaged to the plaintiff ſome leaſehold eſtates, wharfs and three hoys, but kept poſſeſſion of the hoys, and ſome time after became bankrupt. The plaintiff brought an ejectment, and got poſſeſſion of the leaſehold eſtate, but the aſſignees got the hoys. The leaſehold not being ſufficient to pay the plaintiff his principal and intereſt, he brought a bill to foreclooſe, and to compel the aſſignees to redeem the hoys, or that they might be ſold to pay his demands. The aſſignees admitting the leaſehold not ſufficient to pay the plaintiff, inſiſted on their right to the hoys under the ſtatute; the bankrupt having the poſſeſſion, and acting as owner thereof till declared bankrupt. Lord *Talbot* decreed, that the plaintiff might be at liberty to come in under the commiſſion for his deficiency; diſmiſſing the bill ſo far as it required account of the profits of the hoys;

which were ordered to be ſold for the benefit of the creditors in general. No caſe has ſince occurred where it was held that a mortgage by way of condition is not within this clauſe: and wherever it has come before Lord *Chancellor* with proper facts ſo as to create a doubt, it has been
(353) ſent to be tried; as (u) in *Borne* v. *Dodſon*, 5 *December* 1740, but it never was. So upon the bankruptcy of *Raymond, ex parte Page*, where the mortgagees gave it up, coming in under the commiſſion.

If then any, or ſome, mortgages may be within this act, the ſecond queſtion is, whether the ſix mortgages, or any of them, are within the ſtatute? Which will depend on three conſiderations: the nature of the chattels; the intereſt conveyed; the perſons to whom, or for whoſe benefit, they are conveyed. The chattels are ſtock and utenſils in trade; the debts due and to be due; and yet poſſeſſion of the whole left with the bankrupt; who had the order and diſpoſition of them as before; ſold, altered, and diſpoſed as owner: was reputed as ſuch: and all this with the expreſs conſent of the mortgagee, who might have prevented this; the nature of the conveyance being ſo. Nor was he to account with the diſponee for what he ſhould ſell, nor for any of the debts he ſhould recover; for that might probably have altered the caſe. As to the ſpecific goods that were to be, the aſſignments of them are merely void at law, and only to be ſupported in equity by way of agreements to be performed when the goods come *in eſſe*; this court conſidering it as done from the time it ought, whereas courts of law only give reparation by damages. As to the debts, preſent and future, they cannot be aſſigned at law: and in equity it can only be ſupported, where the aſſignees have a proper power to ſue for, recover, and receive the debts aſſigned. Whereas here the bankrupt after conveyance is to ſue, *&c.* and not to come to any account. And debts come within the words and meaning of the act, within the word *chattels*, and would paſs in a will thereby. As to the intereſt conveyed, they are all, except one, ſhares of the ſtock: and the act requires delivery, and that poſſeſſion ſhould be altered. The mortgagees of part ought to come into the trade, and act as part-owners, and then it will be notorious, who are the true owners: which anſwers the objection, that delivery could not be given of parts of the goods. As to the perſons claiming the benefit of the aſſignments, it muſt be admitted

(u) 1 Atk. 154.

admitted, that each partner has a pledge on the partnerſhip effects, for what is due to him upon adjuſting the account, and the ſurplus muſt be divided: but here the money advanced by *Stephens* has nothing to do with the partnerſhip; being an entire ſeparate loan; and if this is ſuffered to ſtand againſt the reſt of the creditors, it will elude all the act of bankruptcy; for moſt trades of the city are carried on in partnerſhip. *Stephens* was after the conveyance owner of the whole, redeemable as to one moiety: yet *Harveſt* continued to act in the partnerſhip, ſold and diſpoſed of his moiety, as he pleaſed. Then as to the general expediency, the policy of the law has been always to level creditors except ſuch as have recovered ſatisfaction, or got ſuch poſſeſſion, as cannot be defeated: whereas if (354) this method of mortgaging were allowed, one or two favourite creditors would ſweep away the whole; nor would creditors know what to truſt to. Trade cannot be carried on without credit, which would be deſtroyed, if ſuch liens are allowed to give a priority; and for above a *century* have the legiſlature been guarding againſt it. It is no injuſtice to turn aſide ſuch mortgagees, who truſt the credit of the bankrupt, and would in caſes of inſolvency ſet up their conveyances to defeat others, who were induced to truſt on the credit of his ſtock and trade: not indeed that all mortgages of goods without delivery are void: as of ſhips or cargo at ſea; but then every thing is done to enable the taking poſſeſſion upon arrival, as invoices, bills of lading, *&c.* So in caſe of bulky goods, delivery of the key of the warehouſe to the mortgagee; but theſe caſes fall not within the act, nor the miſchief intended to be remedied.

Attorney General and Mr. *Wilbraham* for all the mortgagees.

The general queſtion is, whether any, and which of theſe mortgages are ſecurities, under which the ſeveral defendants claim, are made void in the whole or in part by 21 *J.* 1. 19? Upon which two conſiderations ariſe. Whether the particular intereſt, claimed by the mortgagees in goods, be ſuch as made them true owners within the clauſe of that act? Secondly, as to the goods aſſigned, what poſſeſſion could be given? The true view of the laws relating to bankruptcy is, that all conveyances to defeat creditors ſhall be abſolutely void. The real ground of the conveyance was to be inquired into to rebut the general charge of fraudulent conveyances: and it would be an odd conſtruction, that in all events, although a valuable

conſideration were paid, it ſhall be abſolutely void, becauſe the poſſeſſion was left in the conveyer: though ſtrong evidence of fraud, it was only evidence, and capable of being rebutted; and the conſideration, if good, was a ſtrong circumſtance to be oppoſed thereto. The meaning of the act was to prevent falſe credit by a perſon having goods which did not belong to him; being ſold abſolutely. Not a word in the act about pledges, but only general conveyances. A mortgage is the appropriation of a ſpecific thing to certain purpoſes; not only for payment of money, but for indemnifying on divers occaſions. A pledge requires delivery of the thing; a mortgage does not. That they differ may be ſeen by *Juſtinian's Inſt. Tit.* 6. and by the definition of *Hypotheca & Pignus. Bro.* 271, *Treſpaſs*, it is no pledge unleſs delivered at the ſame time. But mortgagor is preſumed and underſtood to have poſſeſſion: nor was the retaining poſſeſſion ever evidence of fraud, where the conveyance was intended only as a mortgage, 2 *Bul.* 226. It is the ſame with regard to goods as to lands. *Chan. Pre.* 285, where a redemption was intended: the produce of goods may be granted as well as the goods themſelves. The words *owner* and *proprietor* are
(355) to be limited by the nature of the conveyance, and extends not to mean the real owner in all caſes. Though the preamble is the key, Lord *Cowper* in *Copeman* v. *Gallant*, 1 *Wms.* 314, would not allow that the preamble ſhould reſtrain the enacting clauſe. A factor, having goods ſent him from abroad to ſell, is not owner within the act; becauſe, if he becomes bankrupt, the court will take the goods out of the hands of the aſſignees for the right owner. It is common to have general acts of parliament from particular caſes, and ſometime the legiſlature recites the particular, and ſometimes a general reaſon: the preamble therefore, where general, ought to be conſidered with the enacting part; but where a particular reaſon is given, it would be odd to conſtrue the remedy for that caſe only, and not take the act in general. The mortgagor is generally conſidered as *true owner*: ſo in common law courts, and in the acts concerning mortgages and the redemption of eſtates, he is called owner. The word *owner* is indeed ſufficient to take in ſpecial owner; but that this act does not interfere in this caſe, appears from *Magot* v. *Mills*, 1 Lord *Ray.* 286, and *Jacob* v. *Shepherd*, cited in 2 *Wms.* 431. If poſſeſſion was to be altered, it would in this caſe defeat the mortgage; for it was intended, that the trade ſhould be continued, and not to put the mortgagee in poſſeſſion. The nature of the mortgage was proper to have

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the poſſeſſion kept in the mortgagor: therefore like the caſe of a leaſehold eſtate for years; a mortgage of which, though a chattel is not within the act, and there is a great diſtinction between the poſſeſſion of goods being in the perſon, who is real owner, and one who is only conditional owner. 1 Lord *Ray.* 724. As to the things aſſigned, it could be of no uſe to the mortgagee to take theſe utenſils, being fixed to, and continued as part of the premiſes. A ſhare in trade is a mere *choſe in action.* 2 *Wms.* 427. *Small* v. *Oudley.* Some of the things are to be *in futuro*, and of which the mortgagees could not poſſibly have poſſeſſion: this court will bind property, which the law will not bind; and this act can affect nothing but what means a legal conveyance. If the general acts of parliament or the common law give not theſe kinds of debts or goods to the general aſſignees, this act cannot; and the mortgagees will have a lien and priority: not that the creditors of the partnerſhip ſhall be hereby prevented; but the plaintiffs are private creditors; and theſe are only aſſignments of the reſidue, after payment of the partnerſhip debts, of what ſhall be taken hereafter; which can be aſſigned in equity, but not in law. In notion of law, the poſſeſſion of one partner is the poſſeſſion of the other: it is common to have a covenant in a partnerſhip that one partner ſhall not aſſign without conſent of the other, and the aſſignee of part of the partnerſhip effects cannot maintain *trover*; for the partnerſhip may be given in evidence, and the aſſignee has no remedy but in equity. Had it been to *Stevens* inſtead of *Potter*, it could not have been within the act; for there to all intents *Stevens* would have been in poſſeſſion. In the very deed the aſſignment is ſaid to be in truſt for *Stevens*; and then it will be preſumed, that *Potter* ſuffered *Stevens* to continue in the poſſeſſion which he had before, *viz.* real owner as to one moiety, and ſpecial owner as to the other. Then as to the exigencies of trade, money is often wanted at an hour's warning; and then it is frequent to borrow upon goods for a limited time: and if a man was in that caſe to put another in poſſeſſion of his ſhop, or to deliver the key of his warehouſe, it would be publiſhing himſelf a bankrupt to the world. Credit is a very tender thing; and if the method was to deliver poſſeſſion in all caſes, it would be ſo great an inconvenience as to deſtroy all credit and truſt whatſoever.

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Reply. The clauſe in this act extends indeed to abſolute ſales; but not to that caſe only. Allowing that the enacting part ſhall not be reſtrained by the preamble, yet that

that it goes as far as the caſe in the preamble, can be no queſtion; but whether it ſhall go farther? The caſe ſtated in the preamble, that *many convey* and ſtill retain, is the preſent caſe; for in abſolute conveyances it would not often happen without fraud. Chattels are no real pledge or ſecurity, unleſs a delivery; it is otherwiſe in caſe of lands; the title being a ſecuritywithout the rents and profits. The diſtinction between mortgagee and pledgee is nominal only, and alters not the nature of the contract: the *Roman* law ſays, *hypocheca* and *pignus* are the ſame; ſo *Calvin's Lex*; and ſo is the nature of the contract.

LORD CHANCELLOR.

The power of a maſter to bind a ſhip is called *hypotheca*; yet there is no delivery of poſſeſſion; and it differs from *pignus* or pledge.

Reply. It does ſo; but the maſter has a particular lien, by way of ſecurity for what might be due to him: and thoſe caſes are exactly the ſame as abſolute ſales, where delivery may not at all times be neceſſary. 2 *Bul.* 226, relating to mortgage of lands, is quite out of the caſe. The general proprietor here acts with conſent of the ſpecial. *Hale* in his *Analyſis* in his diviſion of ſpecial property, ſays, that a pledge and grant on condition, is a ſpecial property: the *report* in 1 Lord *Ray.* 286, has only ſtated ſome *dictums:* as to 1 Lord *Ray.* 724, the fourth point, the only queſtion was, whether the execution was fraudulent? not a mortgage by a bankrupt, but the putting goods into the hands of another to ſell on his account. In *Jacob* v. *Shepherd*, if the act had been thought of, that caſe was not within it; nor was it truly referred to in 2 *Wms.* 427.

(357) LORD CHANCELLOR.

It was not. Sir *Joſeph Jekyl* ſet aſide the aſſignment of goods as fraudulent, without taking notice of this clauſe. But Lord *Chancellor King* was of a different opinion; becauſe there was a conſideration; and that he could not make a bankruptcy, where the law did not. But the aſſignment being ſo extenſive, he ſent it to law, to ſee whether the aſſignment itſelf was not an act of bankruptcy; but ſtill took no notice of this clauſe.

Reply.

Reply. Then *Small* v. *Oudly*, 2 *Wms.* 427, falls under the ſame conſideration: the preſent ſtatute was not under conſideration, nor could it be. No chattels were ever intended to be excepted out, but ſome chattels cannot come within the circumſtances of the act: as leaſehold, which are governed by the ſame rules as real eſtates. It is objected, that the act extends only to legal, and moſt of the things here aſſigned are equitable chattels: but where the act ſets aſide all conveyances, it means both in law and equity; and equity muſt follow the law. The only caſe in which, as to the rules of property, this court does not follow the law, is, that a widow is not intitled to dower out of a truſt eſtate; which obtained at firſt without being attended to. Poſſeſſion of debts aſſigned may be given by delivery of the ſureties, and by giving power to receive and recover: but here all thoſe powers are left in the bankrupt, and to apply the debts to his own uſe. Certainly he, that lends money on goods in a ſhip, and not taking poſſeſſion, will lend without that ſecurity, and on the general credit; for ſuch goods, are really no ſecurity; becauſe the moment they are ſold, the lender becomes a general creditor. The line how far the act extends, and where to ſtop, is eaſily drawn, by the act itſelf; for where poſſeſſion of the bankrupt is without conſent of the mortgagee, it is out of the act: otherwiſe not. It is ſaid, this will prevent aſſignment of ſtock in trade; but an abſolute aſſignment of all ſtock in trade would hardly be good in caſes of bankruptcy, even laying it out of this act: it was ſo ſaid by the *Maſter of the Rolls* in *Small* v. *Oudley*; it being only ideal, and carrying a badge of fraud.

The court having taken time to conſider, now delivered their opinion.

Burnet Juſtice. This caſe is of ſo extenſive a conſequence to trade in general, it may be attended with ſuch inconvenience either way, and in moſt reſpects is ſo wholly new, and no judicial determination, that I ſhall endeavour to lay my thoughts in as clear a light as poſſible.

On ſtating the caſe as far as it relates to the queſtion, as it ſtands on the pleadings and the *Maſter*'s report, the general queſtion ſeems to be, whether theſe ſix mortgagees, or any of them, will be intitled to reſort to the utenſils, *&c.* for a ſatisfaction of their debts? Or whether, like the reſt of the creditors, they muſt come under the commiſſion for a diſtributive ſhare of thoſe debts? Which depends (358)

on

on a more reſtrained queſtion: whether theſe ſix mortgagees, or any of them, did not permit the bankrupt to continue in the poſſeſſion, order, and diſpoſition, ſo that by the ſtatute 7. 1. the commiſſioners were intitled to ſell and diſpoſe of theſe ſeveral mortgaged chattels for the benefit of all the creditors?

It is natural from the mortgages to conſider this in three diſtinct lights. Firſt the nature of a mortgage or conditional ſale of ſpecific goods, things in poſſeſſion, of which there may be actual delivery, where the bankrupt continues in poſſeſſion of theſe goods; and it is neceſſary to conſider ſuch mortgage to a ſtranger, and to a partner. Next the nature of three of theſe mortgages to ſtrangers, as conditional ſales of things partly in poſſeſſion, as utenſils and ſtock in trade, and partly *Choſes in action*, as debts and future profits. Laſtly, whether the general rule will extend to it, ſuppoſing theſe mortgages to ſtrangers are within the ſame rule as mortgages of ſpecific goods, whether there is any difference between a mortgage to a partner and to a ſtranger? And although the preſent queſtion muſt wholly receive a determination from the clauſe in the ſtatute, yet it is neceſſary to conſider conveyances to creditors before that ſtatute.

Pawns. But previouſly it is proper to clear the queſtion with relation to pawns. It was contended, that pawns by the *Roman* and *Engliſh* law required delivery, but that *hypothecation* or mortgage did not. As to the *Roman* law, there Mortgages. was an authority cited, *Juſt. Inſt. Lib.* 4 *Tit.* 6, *Sec.* 7, which paſſage, if it ſtood alone, might be a good way to prove what it was cited for. But there is another *Roman* authority, proving *pignus* to be as valid without delivery: and the true diſtinction between them is only, that *pignus* is of moveables capable of delivery, the other of immoveables only. *Domat Lib.* 1. *Wood, Lib.* 3. *Chap.* 2, 219. *Digeſt.* 50. *Tit.* 16, *Law* 238. 13 *Lib. Pandects, Tit.* 7. *Law* 1. 20 *Lib. Pandects, Tit.* 4, *Law* 12, § 10. where a pawn to two, and delivered but to one, and where the pledge is concurrent in point of time, the preference to the perſon, to whom a delivery is ſtated there, that he will have a better remedy by way of action than the other. Delivery then is not neceſſary by the *Roman* law: and the other nations receiving this *Roman* law corrected the inconvenience of this law as to that point that if a pawn is not delivered, it ſhall not affect a purchaſer for valuable conſideration, as it certainly did in that law. But ſuppoſing

ſing that diſtinction true, it could have no influence in the preſent caſe, unleſs the *Roman* hypothecation and *Engliſh* mortgage were the ſame; which they are not. No property was transferred in the hypothecation: an *Engliſh* mortgage is an immediate conveyance, with power to redeem; and equity at any time admits redemption, notwithſtanding forfeiture; but that does not alter the conveyance, therefore there is no compariſon between them: and in the *Roman* law there is a place where it is held, that ſuppoſe there is an hypothecation, with condition that if the money is not paid at the day, the pawnee ſhall enjoy the goods: that is a conditional ſale. *Juſt. Code, Lib.* 4. *Tit.* 54, *Law.* 2. and the ſame *Liber* of the *Code* relating to conditional ſales of moveables, *Law* 7. All that can be inferred from the *Roman* law with reſpect to pawns and hypothecation, will be foreign: and from the *Engliſh* law, as to pawns, as foreign. I admit delivery neceſſary to a pawn: the *year book* cited, 5 *H.* 7, is an expreſs authority in point; and therewith agrees 2 *Rol. Rep.* 439, *Roſs* v. *Bramſted*, that it is no pawn where no poſſeſſion is transferred at the time. 2 *Leon.* 30, and *Yel.* 164, are caſes not of pawns, but bailment to third perſons to ſell goods for the uſe of a particular creditor, who will have an intereſt in the performance of that contract, and may ſue the bailee; which has nothing in common with the caſe of a pawn. All the books treating of pawns, treat them as in the poſſeſſion of pawnee; where a pawn is compared to diſtreſs, and ſuppoſe that the cuſtody of the pawn muſt be in the pawnee. *Owen* 123. 2 Lord *Ray.* 917. 2 *Sal.* 522. but there is one caſe more, where the proper diſtinction between mortgage and pawns is taken. *Ratcliff* v. *Davis*, *Noy* 137. *Cr. J.* 244. *Yel.* 179. 1 *Bul.* 29. where the court held, there was a ſpecial property in pawnee, intitling to the cuſtody, till the condition is performed: but that on payment the whole property veſted in pawner; diſtinguiſhing it from a mortgage, which is a conveyance of the thing: that therefore muſt be laid out of the caſe, becauſe it has nothing in common.

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(x) The next conſideration then is, in what condition the creditors ſtood, in relation to conditional ſales or mortgages by their debtors to their prejudice, where the mortgagor continued in poſſeſſion of the goods mortgaged: and the ſtatute governing this matter is 13 *Elizabeth*; in which there is no diſtinction between conditional and abſolute ſales, provided they are fraudulent. This ſtatute being made

Fraudulent conveyances.

(x) 1 Brown 125.

made to protect creditors againſt all conveyances to defraud them, it was incumbent on a court of equity, or a jury at common law, upon conſidering the whole circumſtances to pronounce, whether the conveyance was made with ſuch intent or not. Where the neglect naturally tended to deceive creditors, it has been held a badge of fraud, where left in his hands. But if from concurrent circumſtances it appeared, the title deeds were not left to defraud creditors, but upon reaſonable and honeſt purpoſes, or left (360) with the vendor, not ſo as to deceive touching his ſubſtance, that being accompanied with other circumſtances, could not be pronounced a badge of fraud. Therefore it lay open upon this to determine whether fraudulent or not. The leading caſe on this is *Twine*'s caſe; where it is held, that it was upon a valuable conſideration, but not *bona fide*, from the continuing in poſſeſſion, and trading therewith. It is difficult, unleſs in very ſpecial caſes, to aſſign a reaſon, why an abſolute or conditional vendee of goods ſhould leave them with vendor, unleſs to procure a colluſive credit: and it is the ſame whether in abſolute or conditional ſales; neither the ſtatute, or the reaſon of the thing, making any difference. If no delivery is neceſſary on a mortgage, they may be mortgaged three times over, above the value; and then it is juſt the ſame, as if they remained in his hands after one abſolute ſale. But it is inſiſted, there are ſeveral caſes, where there is a diſtinction as to this poſſeſſion after ſale between conditional and abſolute conveyances of lands or goods. That of lands is not applicable to a caſe of goods: the caſe cited for this was *Stone* v. *Grubbam*, 2 *Bul.* 226, and 1 *Rol. Rep.* 3. but no argument from thence, unleſs the poſſeſſion of lands and goods after a conveyance was on the ſame foot. Poſſeſſion is no otherwiſe a badge of fraud, unleſs as calculated to deceive creditors. There is no way of coming at the knowledge of who is owner of goods, but by ſeeing in whoſe poſſeſſion they are: the poſſeſſion of lands is of a different nature; there may be a poſſeſſion as tenant at will; as every mortgagor is of a mortgage before the condition is broken. Every one deſiring credit intitles to an inquiry into his ſubſtance; and therefore becauſe the poſſeſſion of land is of an ambiguous nature, as it may be in the hands of the tenant, as well as the owner, the title deeds, *&c.* may be required: but never at what market goods were bought; the poſſeſſion and *uſure* of them being all. Therefore in equity, where deeds are left with a ſecond mortgagee, and the firſt mortgagee neglects to take them into his poſſeſſion, the firſt mortgage is poſtponed.

Conditional and abſolute ſales.

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The reaſon is given by Lord *Talbot* in *Head* v. *Egerton*, 2 *Wms.* 280; he ſuffering for his fraud. The next caſe cited for this was *Bucknal* v. *Royſton*, *Chan. Pre.* 285, but no diſtinction was taken there between conditional and abſolute ſales by Lord *Cowper*; but that there was no evidence in the caſe before hin of a poſſeſſion calculated to acquire a falſe credit, which would make it void. The next caſe in ſupport of this diſtinction was *Megot* v. *Mills*, 1 Lord *Ray.* 286, and *Caſes in the time* of *King William*, 159; from both which books it appears, the caſe was ſo imperfect, that the court ſent it to a new trial. What reaſon weighed with *Holt* is not clear; but it is clear, that it was not this diſtinction; diſtinguiſhing only bills of ſale to a landlord, from any other creditor. But though from all theſe caſes it does appear, that in the conſtruction of the 13 *Eliz.* there is no diſtinction between conditional and abſolute ſales of goods, if made with intent to defraud creditors, yet a court of equity or a jury are left at large to conſtrue, whether it was made with ſuch intent or not. (361)

Then to conſider the ſtatute of *J.* 1. the 10th ſection is by miſprint connected with another part, to which it has no connexion, when it is the preamble to the eleventh; no diſtinction is made in this preamble between abſolute or conditional conveyances: nor is there any reaſon; as the thing may be mortgaged twice or thrice over. Undoubtedly as the preamble makes no ſuch diſtinction, ſo the enacting clauſe will in its deſcriptive words take in one as well as the other. The only queſtion which can ariſe, is, whether the mortgagor, and not the mortgagee, ſhall be conſtrued the true owner and proprietor. The conditional vendee is ſo; and the contrary can be no other principle than that of confounding pawns and mortgages. There might be ſome doubt perhaps in the caſe of a pawn, and 3 *Bul.* 17 was cited. But how can that be doubted in the caſe of a mortgage? Which is an immediate ſale, although by performing the condition the thing may be redeemed afterward by indulgence of a court of equity: but till performance the conditional vendee, though ſubject to be deveſted thereof, is the abſolute proprietor. A pawn is complete by the delivery, but an abſolute ſale is complete by the contract, and the party is intitled as ſoon as the money is paid. If conditional vendee, on paying his money for the goods, will not inſiſt upon delivery to him, he confides in the vendor, not in the goods: and therefore ſhould come in the ſame caſe with other creditors, eſpecially as he has been the bait to draw other creditors in. 21 *J.* 1. 19.

in. But there is an expreſs caſe in point deſtroying every ſuch diſtinction, *Stevens* v. *Sole*. It was urged, there were ſubſequent caſes impeaching the ſtrength of this: but none ſuch have I ſeen. As to *Bourne* v. *Dobſon*, *December* 4, 1740, it is ſufficient to ſay, there was no judicial determination: but the Lord *Chancellor* ſaid, the aſſignment, if void, was void at law, and directed a trial; but then conſidered the great inconveniencies which might accrue, if ſhips and a cargo at ſea ſhould be liable to the bankruptcy of the party in the mean time; and on the other hand if mortgages and conditional ſales ſhould be conſtrued out of the ſtatute: ſo that it was not determined, but ſent to law. Another caſe for this was *Brown* v. *Heathcote*, *Mich.* 1746, where it was contended, there was no delivery of poſſeſſion which remained in the bankrupt till the ſhip's return, ſo that it was within the ſtatute of *J.* 1 but Lord *Chancellor* held not; the caſe not being within the deſcription of the ſtatute; for the aſſignor could not be ſaid to have the order and diſpoſition; there being no poſſibility of putting *Heathcote* in poſſeſſion: nor could he conſent or diſſent as to the poſſeſſion continuing, as it did, of a ſhip and
(362) cargo at ſea. Nor does it come within the reaſon of the ſtatute; which was intended to hinder the acquiring falſe credit or ſubſtance; which could not be, where an owner-ſhip could not be ſhewn. And a delivery of all the muniments and means of reducing a ſhip or cargo at ſea into poſſeſſion is in law a delivery of them. So a delivery of the key of a warehouſe is a delivery of thoſe goods, which are bulky, being the only immediate delivery the things are capable of: ſo that this is not within the intent or words of the act, as *Stevens* v. *Sole* is. Then a conditional ſale is the ſame as an abſolute ſale, where the poſſeſſion is left in the bankrupt, in order to acquire a reputation of owner-ſhip, and ſo a falſe credit. It is neceſſary to apply this to theſe mortgages: though *Jonathan Stevens* will be preferred, in point of mortgage upon the real eſtate, to *Tomkins*; yet as to any lien upon the utenſils fixed, the mortgage of *Tomkins* will be preferred to *Jonathan Stevens*. The mortgage of *Tomkins* is of a double nature of a leaſe of the houſe, with the fixed and moveable goods. As to the fixed, there is no title to remove them, till the mortgagee is ſatisfied, for though they might be ſeiſed according to *Poole*'s caſe, 1 *Sal.* 368, yet where a trader erects fixtures to his houſe, and leaves it; neither he, nor any other can remove them during the term, any more than he can cut down trees, during the term he had leaſed, if they are part of the leaſe, and not excepted thereout: thoſe, which

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are not fixed, will be liable to the ſeiſure; in a leaſe of the houſe with the moveables, the whole rent iſſuing out of the houſe, and not out of the chattels. 5 *Co.* 17. 1 *And.* 4. *Dyer* 212. *b.* It is true, that a partner is poſſeſſed *per my & per tout* of the chattels; and therefore no actual delivery is requiſite: but the offence of the ſtatute is not that, but the permitting to continue in poſſeſſion after a ſale to another; and that other is intitled to the poſſeſſion of the whole in *entierty*, as *Jonathan Stevens* was intitled: who therefore permitting *William Harveſt* to continue as half owner, is within the caſe deſcribed in the ſtatute. Next conſider the other three mortgages of a ſeventh ſhare of the bankrupt's moiety in the partnerſhip ſtock, utenſils, debts, ſtock and profits in trade, partly things in poſſeſſion, partly in action. But I will firſt conſider the caſe of an aſſignment of a mere *choſe in action*. The ſimpleſt caſe I know, is of a debt on bond; which is only aſſignable in equity, not at law: the reaſon why aſſignable in equity is, becauſe the aſſignor can furniſh the aſſignee with all the means to reduce it into poſſeſſion, giving authority to ſue in his name, and the bond into his hands to prove the debt, when he does ſue. Why is not delivery then as requiſite on ſuch an aſſignment, as a delivery in the conveyance of a thing in poſſeſſion? Why will not the means of reducing into poſſeſſion be conſidered in the ſame light as a conveyance of the thing itſelf at law? A bond debt is certainly a chattel; although ſome doubt was formerly made of that; ſo that in a grant of all goods and chattels, a bond debt would not paſs. But that is not becauſe it is not a chattel in its nature; but becauſe of the forfeiture to the king, who takes the obligation and duty thereof, *Bro. Prerog.* 20. 3 *Inſt.* 55. *Finch's Law, Lib.* 2, *Chap.* 17. But the concluſive caſe is *Ford's* caſe, 12 *Co.* 1. that perſonal actions are included in the word *goods* in an act of parliament as goods in poſſeſſion. Then the debt, by the aſſignor's continuing it in his hand, is in his order and diſpoſition, as he may receive the money due, and cancel the bond, and aſſign it over again to another creditor; and cannot have this bond but by conſent of the true owner in equity: and therefore as he is not obliged to accept a defective ſecurity, it is his own fault. As to bulky goods, the means of reducing into poſſeſſion has been held ſufficient: why not then in the caſe of a *choſe in action?* But this caſe will not need that expreſs determination, this being an aſſignment of things partly in poſſeſſion, partly in action. It has been ſaid, a ſhare in trade is a mere *choſe in action*, and *Small* v. *Oudley* cited for it: but that could not come within the ſtatute.

ſtatute. There is a diſtinction between the trade of the ſame and of another man; and every act muſt be conſtrued largely and beneficially in favour of creditors. If goods are aſſigned to a factor, who, before he breaks, ſells them; money has no ear mark, and the merchant muſt come under the commiſſion: but if he lays out the money in freſh new goods to be ſent to that merchant, thoſe goods may be followed. 1 *Sal.* 160. Suppoſe the bankrupt had ſold theſe goods, and takes notes payable to himſelf for the money, and breaks before they are payable: the aſſignee receiving the money on theſe notes, it would be money had and received to the merchant's uſe, becauſe it aroſe from the ſale of goods of that merchant: *Surman* v. *Scot*, *C. B. Hil.* 16 *G.* 2. As the goods themſelves would be liable, why ſhould not the profits ariſing from the ſale thereof be in the ſame condition? As to the three aſſignments of the ſeventh ſhare of a moiety, they permitting the bankrupt to act and intermeddle as owner of the whole moiety, muſt come as other creditors under the commiſſion; forfeiting any right to reſort to theſe mortgages themſelves for ſatisfaction. The laſt point is in relation to the aſſignment of the whole moiety to *Potter* in truſt for *Stevens*: which will either fall under the conſideration of an aſſignment to *Potter* as diſtinct from *Stevens*, or in the ſame light as if an aſſignment to *Stevens* directly; and in either light it will not vary the determination. If as an aſſignment to *Potter*, he will be truſtee for *Stevens* till redemption; and there will be a reſulting truſt after redemption for *William Harveſt*, who in ſuch caſe ought to have delivered the partnerſhip deed over to *Potter*, if he was diſtinct from *Stevens*; becauſe that is part of his title, and *Potter* ought to have been admitted partner for a moiety; for it is difficult to ſay, why *William Harveſt* was permitted, after a conveyance of his whole moiety to *Potter* (which was all his ſubſtance) to continue acting as owner, and with the partnerſhip deed to ſhew that he was owner for a moiety, unleſs for the purpoſe of gaining a deluſive credit. But if it is conſidered as an aſſignment to *Stevens* himſelf, he, being ſeiſed *per my* and *per tout*, will indeed require no actual delivery: but the permitting to act, after parting with all the intereſt till redemption, is the very thing the ſtatute was intended to prevent. The partnerſhip deed might be inſiſted on to be depoſited; for *William Harveſt* was ſecure without having the deed in his poſſeſſion. *Stevens* then is the true owner of this moiety, and has permitted the bankrupt to continue in the order and poſſeſſion as if owner; and he has been repuuted owner, and has taken upon him the order and diſpoſition of this moiety as owner,

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and has taken upon him the order and diſpoſition of this moiety as owner, and comes within the expreſs words of the miſchief and intent of 21 *J.* 1. otherwiſe a door would be open to fraud by a partner being permitted to retain all the badges of ownerſhip to deceive the reſt of the world. It was inſiſted, the partnerſhip ſtock was a ſecurity: but they are on the ſame foot as ſtrangers. If one partner lends money to another partner on a ſeparate account, it is never held that this moiety in the ſtock would be a ſecurity for that. The general rule in 2 *Chan. Rep. Oct.* Lord *Craven*'s caſe, and 2 *Ver.* 293. *Richardſon* v. *Goodwin*, and 3 *Wm.* 180. *Croſt* v. *Pyke*, is ſtrong againſt ſuch a rule. It may be ſaid, it will lay trade under great reſtraint, if a trader cannot mortgage his whole ſtock without admitting into his trade. That may be inconvenient, but the inconvenience on the other ſide is greater. If it is once eſtabliſhed, that the friends of a ſinking man may ſecure themſelves by a mortgage on every thing he has, which is valuable, without running a riſk themſelves, commiſſions of bankruptcy will become uſeleſs, when nothing is left to the creditors. As to the moveables therefore, theſe ſix mortgages notwithſtanding, they will be liable to the diſpoſal of the commiſſioners by the ſtatute 21 *J.* 1. As to the fixed, no removal can be till ſatisfaction of the mortgage of *Tomkins*.

Lord *Chief Baron Parker*. I will take this caſe upon the general queſtion, as it has been ſtated. There are four queſtions: firſt, whether any mortgage, or ſale upon condition of redemption, is within this clauſe? Secondly, whether mortgages or ſales on condition of ſpecific chattels are within it? The third, whether a mortgage or ſale on condition of a particular part or ſhare of trade is within it? The fourth, whether the mortgage or ſale to *Potter* in truſt of *Stevens* is within it?

As to the firſt: laying out what was offered at the bar, relating to hypothecation or pawns, as not affording any light in this caſe, let us conſider how the law ſtood before the ſtatute of *J.* 1. Fraudulent deeds are made void by 13 *Eliz.* in which there is a *proviſo* not to extend to conveyances on good conſideration *bonâ fide*. *Twine*'s caſe was held not *bonâ fide*, becauſe accompanied with a truſt. Although the clauſe in 21 *J.* 1. does not in its introduction expreſsly ſpeak of frauds, yet the reaſon of the legiſlature was to prevent that falſe credit, which was deſtructive to trade; and a farther remedy was intended than by 13 *Eliz.* (365)

13 *Eliz.* and a mortgage or ſale on condition is within this clauſe, and within the miſchief. But the principal difficulty on this part ariſes from theſe words in the clauſe, *by conſent of the true owner and proprietor.* But in this clauſe they are put in oppoſition to a falſe or ſeeming ownerſhip: and therefore mortgagee or vendee upon condition may be ſaid to be true owner; and a contrary conſtruction would defeat this clauſe. But this point was ſettled in *Stevens* v. *Sole.* The thirteenth clauſe of this act, giving the aſſignees of the bankrupt's eſtate a right to redeem, only relates to mortgages regularly made, and not to ſuch as are void for want of delivery of the goods; therefore no argument for the defendants.

As to the ſecond; we muſt conſider firſt, whether the bankrupt's own goods only, or the goods alſo of perſons left with the bankrupt for ſale or ſafe cuſtody, are within this clauſe? The preamble, ſpeaking of bankrupts only, is narrower than the enacting part, which ſpeaks of any goods: then as to the effect of it, I admit in many caſes the preamble will not reſtrain the general purview, as in 1 *Jones* 163. *Pal.* 485. But it is a rule, and ſo agreed there, that where the not reſtraining the generality of the enacting clauſe will be attended with inconvenience, it ſhall reſtrain: and here would be an inconvenience, if not reſtrained, from the hazard to trade. In *L'Apoſtre* v. *L'Plaiſtrier* the preamble governed. So in *Godfrey* v. *Fuzzo*, 3 *Wms.* 185. So in *ex parte Marſh*, *Auguſt* 1744. I own in *Copeman* v. *Gallant* Lord *Cowper*'s reaſon for holding it not within the clauſe of the ſtatute was, that the aſſignment was with an honeſt intent, for payment of the debts of the aſſignor, and he decreed for the plaintiff. I have a great reverence for his memory; but though I approve of his decree, I cannot agree to the reaſon; for though an honeſt intent will intitle to regard; yet if an honeſt intent is ſufficient to take it out of this clauſe, both the letter and intent will be overturned. As to the objection on part of the defendant from the caſe of factors, the reaſon of it is not well founded; becauſe it muſt relate either to perſons acting by commiſſion only, or in their own right and by commiſſion; in neither of which is there any deceit, ſo that the reaſon fails: in the former there is no pretence, that the lender advances his money on the viſible ſtock, it is on the general credit. Then conſider, whether any of theſe goods in the Maſter's report are within this clauſe. As to the goods fixed, they are like trees, conſidered in law as part of it: but as they are capable of being

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ſevered (I do not mean by ſeverance a cutting down) they are capable of being reunited. *Hob.* 168. *Stukely* v. *Butler*, and *Owen* 49, the things fixed to the brew-houſe had (366) been ſeveral times mortgaged diſtinct from the brew-houſe, but were veſted in *William Harveſt* afterward, and no occaſion to deliver to *Tompkins*: but they will paſs by the mortgage of the brew-houſe with the things fixed. I admit *Pool*'s caſe in *Sal.* that during the term the goods may be ſold: but the preſent is diſtinguiſhable, there being a mortgage; nor could he remove the fixtures, becauſe of the mortgagee's intereſt: otherwiſe great inconvenience would follow; as leſſor of a brew-houſe with his own fixtures would be liable to be ſtripped thereof. As to the utenſils unfixed, where the goods mortgaged are of ſuch nature as to be capable of delivery; but if no delivery can be at the time of the mortgage, it is ſufficient, if the proper means of reducing into poſſeſſion are given. If bulky goods in a warehouſe are mortgaged, delivery of the key will be ſufficient. I agree alſo with *Heathcote*'s caſe; but there Lord *Chancellor* determined it not within *Stat.* 21 *J.* 1. chiefly becauſe the ſhip and cargo could not be delivered but by delivery of invoices, *&c.* It is objected for defendant, that an undivided ſhare of ſtock will not admit a ſeparate property and poſſeſſion, and therefore for neceſſity the poſſeſſion of mortgagor muſt be poſſeſſion for mortgagee: but though it is true, that a partner has a joint intereſt, theſe intereſts are ſeverable; as appears by a *fieri facias* againſt one partner, which will not affect the other's moiety; the conſequence of a ſale under that will be, that vendee of the ſheriff will be tenant in common with the other partner. 2 *Mod.* 279. 1 *Sho.* 173. *Sal.* and 2 *Ray.* 871. To conſider the caſes cited: in *Megot* v. *Mills*, this ſtatute appears not by the report in Lord *Ray.* to be conſidered; though it might properly: the other ſtatutes were only conſidered; which differs it from the preſent. Next *Cole* v. *Davis*, 1 *Ray.* 724. admits the ſame anſwer; and I doubt, whether the ſale there was not accompanied with a truſt, like *Twine*'s caſe; ſo as to be avoided by 13 *Eliz.* but that was not within the clauſe of the ſtatute *J.* 1; becauſe the bankrupt there did not take on him the ſole alteration as owner (which is required by the clauſe) but the ſheriff. As to *Small* v. *Oudley*, a diſtinction was taken by Sir *Joſeph Jekyl* between a man's own trade and another's: this clauſe was overlooked both by court and counſel. *Buckner* v. *Royſton* is rather an authority againſt defendants than for them. In the preſent, all the requiſites in 21 *J.* 1. concur to bring the caſe within it; as the poſſeſ-

ſion of the goods was not delivered, though capable thereof; *William Harveſt* having the poſſeſſion; and the articles of partnerſhip, an evidence of his title in his hands; and taking upon him the ſole alteration as owner.

On the third queſtion, it is objected for defendant, that this clauſe extends not to things in action, as are mortgages of parts of ſhares; ſpeaking only of goods and chattels, which a perſon has at time of bankruptcy in his poſſeſſion: but goods and chattels include debts. *Stam.* 188. *A. Slade*'s caſe, 4 *Co.* 95. and things in action are conſidered as goods and chattels in a perſon attainted; and ſo the crown intitled. *Litt.* 80, *Clayton*'s caſe: ſo 12 *Co.* 1. If then goods and chattels comprehend things in action, in the conſtruction of any act of parliament, it ought in this; for otherwiſe he might aſſign without notice to others, and ſo have the order and diſpoſition within the meaning of this clauſe; and this is enforced by the firſt clauſe, that the moſt beneficial conſtruction for creditors under the commiſſion ſhould be made. But it is ſaid, there can be only an equitable aſſignment of a *choſe in action* which is true, and yet in caſe of bonds aſſigned (for bills of exchange or promiſſory notes are aſſignable at law) they muſt be delivered; and ſuch delivery of the bond, on notice of aſſignment, will be equivalent to the delivery of the goods; for the debtor cannot afterward juſtify payment to the aſſignor. *Domat. Lib.* 1. this clauſe extends to things in action; and all has not been done to diveſt the right from the bankrupt, and to veſt a right in the mortgagee; for no notice appears to be given. The aſſignees therefore have power to diſpoſe of it for benefit of the creditors.

(367)

As to to the fourth and moſt difficult queſtion: it is objected for defendants, that though *Potter* did not take poſſeſſion, he was merely nominal, and *Stevens* to be conſidered as a vendee of *Harveſt*'s moiety, and was a partner with him, and ſo continued, and in poſſeſſion *per my* and *per tout* with him; and I agree he was at firſt: but when *Stevens* became intitled to the other moiety, the queſtion is, whether he ſhould not have had the ſole, and not a joint poſſeſſion only to take it out of this *ſtatute?* As *Potter* did not interfere, *Stevens* ſhould have taken poſſeſſion, which not having done, *Harveſt* continued in poſſeſſion as viſible partner; received the debts, *&c.* by conſent and permiſſion of *Stephens*; had the order and diſpoſition, and was one of the reputed owners as much as *Stevens*. It is objected, that the law would judge *Stevens* to be in poſſeſſion according

according to his right: but there is no colour for it, where he permitted all this inconſiſtent with his own right. A further difficulty ariſes from the ſeveral determinations in this court, that one partner borrowing or embezzling any partnerſhip effects, his own ſhare is liable; as held in *Meliorucchy* v. *London Aſſurance Company*. The reaſon of thoſe determinations relating to partnerſhip is, that each is liable to the whole of the partnerſhip debts; and if one is charged further than he ought, equity gives him a lien on the partnerſhip effects: that is true, but not applicable to the preſent. Here *Harveſt* did not borrow money or embezzle the effects of the partnerſhip. This is not a partnerſhip tranſaction; but as diſtinct as if ſtrangers had done it. Nor is it applicable in point of reaſon; all the partnerſhip debts being paid. There is no inſtance where this rule of equity extends to private loans; all the caſes relating to partnerſhip tranſactions, and ſo ſhould be confined. Eq. Ab. 8. (368)

I agree therefore, that none of the mortgages in the Maſter's report, except the mortgage to *Temkins*, and thoſe ſecured by buildings on land, are out of 21 *J.* 1.

Lee, Chief Juſtice. I concur entirely. Theſe ſecurities are to be conſidered as mortgages, not as hypothecations, *&c.* as has been properly obſerved by *J. Burnet:* and this is a queſtion, which muſt receive its determination from 21 *J.* 1. 13 *Eliz.* being only declaratory; and all the caſes offered on that head have been already anſwered; I ſhall therefore confine myſelf to the *ſtat.* 21 *J.* 1. as the *ne plus ultra*; the line being drawn thereby which is to govern here; and there are three points thereon.

Firſt, whether the mortgagee is not true owner and proprietor, to whom there ſhould have been delivery of the goods mortgaged? In the general preamble of this *ſtatute*, notice is taken of divers defects in former ſtatutes in deſcription of bankrupts, and in the power to commiſſioners to diſcover and diſtribute the bankrupt's eſtate: and therefore it enacts, that it ſhould be taken moſt beneficially for that purpoſe. Every word of the ſtatute muſt be conſidered both of the preamble and enacting clauſe. The preſent caſe is directly within the words of the preamble; the bankrupt himſelf having conveyed the goods to *John Stevens:* there is no occaſion therefore to give any opinion in relation to that head, of reſtraining the enacting clauſe by the words of the preamble, which is not material to the preſent, it falling within the preamble. To remove the

difficulty with reſpect to commiſſioners of bankrupt, having in their poſſeſſion as reputed owners, and taking upon them the alteration as owners, (which differs it from the caſe of factors, who diſpoſe not as owners, but for others) the commiſſioners may diſpoſe of this, for benefit of the creditors. This ſtatute then makes the reputed ownerſhip as real for benefit of creditors in general; the perſons own miſbehaviour depriving them of the benefit of the conveyance though made for good conſideration; and they ſhall not be in a better condition than other creditors. Conſider then, firſt whether the mortgagee be the true owner and proprietor? There is a clauſe in 21 *J.* 1. relating to redemption of a mortgage by aſſignees, not only mortgage of lands, but goods on condition. In *Co. Lit.* the effect appears of a feoffment on condition; and the reaſon of the difference there, is that the feoffor has only a bare condition, and no eſtate in the land which he can aſſign over: but feoffee has; which is ſaying, that he is owner of the (369) eſtate, as having the intereſt in it. The true owner is in this act of parliament in oppoſition to reputed owner. As to the caſes cited on this point to make a diſtinction between conditional and abſolute ſales; *Stone* v. *Grubham*, 2 *Bul.* 226, was determined entirely on the *ſtatute* of *Eliz.* and common law: though the plan of that ſtatute differs greatly from the plan of the ſtatute of *J.* 1. this act ſuppoſing the conveyance to be on good conſideration, and the party to be an honeſt creditor or mortgagee, but not to have any preference to other creditors, becauſe he does not give notice to other creditors by having that delivery to him, to which he was intitled: ſo that this is more like the caſes on the regiſter act, where the perſon loſes the benefit of the conveyance by not giving notice, ariſing from his own plain neglect. The donee is not to ſuffer donor, who has made the conveyance, to continue in the poſſeſſion there deſcribed; which direction in that act of parliament is as neceſſary to be followed, as in caſes of the regiſter act: and though *Stone* v. *Grubham* is not material to the preſent, (nor is there any thing from any part of that caſe inferring a difference between conditional and abſolute ſales) yet, what is ſaid there, may infer, that mortgagee muſt be conſidered as true owner; for if mortgagor is tenant at will to mortgagee, as ſaid in *Bulſtrode*; who is owner of this eſtate? If the property is transferred to mortgagee, the mortgagor can have only a condition according to *Co. Lit.* 210: and the mortgagee has that intereſt, as makes him owner or proprietor. The other caſes cited for this, have been fully anſwered already.

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The ſecond queſtion is, whether the debts and chattels ſhould not be delivered, as far as they are capable? Upon which *Stevens* v. *Sole* is in point, on the foot of a mortgage of a perſonal thing; and Lord *Cowper*'s obſervation in the caſe in *Chan. Pre.* is agreeable thereto; which two caſes determine that queſtion on the ſpecific goods; and it will be the ſame as to the ſhares of the partnerſhip ſtock, which are partly in poſſeſſion, partly in action; and as to all debts, *&c.* which are conveyable in equity. The inquiry on the ſecond point is, whether *choſes in action* are not included under goods and chattels? and I agree, ſome books countenance the contrary opinion, particularly *Swinb.* 407. 8 *Co. Caley*'s caſe, is like that alſo. This opinion was grounded on the legal notion in reſpect of *choſes in action*; that they are not grantable as *choſes in poſſeſſion*: but this is now out of queſtion, *choſes in action will be included* therein. *Fulwood*'s caſe, 4 *Co.* 65, proves that a *choſe in action* (as an obligation) is a chattel. So *Stamf. Prerog.* 45. *C.* 16, that chattels comprehend a right of action to goods: there is no word in the ſtatute to give this right of action, but the word *Chattels*; and, if forfeited, they muſt be conſidered as chattels in the perſon forfeiting. The ſame interpretation has been made in other ſtatutes: So *Ford*'s caſe, 12 *Co.* If then goods and chattels include *choſes in action*, all the debts, acquired to the partnerſhip by ſale of the joint ſtock, muſt be diſtributable as the goods themſelves; for which *Burnet Juſtice* has cited ſeveral caſes, that the produce of ſpecific goods follow the nature of the goods themſelves: ſo is *Swinb.* 414. (370)

The laſt queſtion relates to the mortgage of *Stevens*, the partner, whether he has had ſuch a poſſeſſion, as will exempt him from being conſidered as owner or proprietor, by whoſe conſent the bankrupt has had in his poſſeſſion the goods as owner, altered, *&c.* I mean goods ſevered; for the fixed are part of the freehold; and, when mortgaged, remain ſo, till the mortgage is ſatisfied? This mortgage to *Potter* in truſt muſt be conſidered as a mortgage to *Stevens*; and though endeavoured to be diſtinguiſhed from the other mortgages, becauſe he was a partner, and in poſſeſſion, and wanted no delivery, the true anſwer has been given to that: that though he held the poſſeſſion, yet not ſuch a poſſeſſion as this *ſtatute* requires, and conſequently it is imputable to him, as owner, that he has let *Harveſt* have poſſeſſion in reſpect of that moiety; producing the ſame inconveniencies by creating a falſe credit. As to *Stevens* having a lien on the ſtock for the money due to him,

him, and his being diſtinguiſhed from other creditors, no caſe has been cited for that. That diſtinction would have been material in *Croft* v. *Pike*, but not taken there; nor can it be here; for it was a tranſaction not concerning the ſtock of the partnerſhip; they are as much diſunited as any others; nor was this a debt created on the joint ſtock; nor can he therefore have any lien on the joint ſtock: and though no judicial determination, yet I may cite a civil law authority, as *Dom. Lib.* 1. *Fol.* 55, concerning partnerſhip, though not as authority on which a judgment is to be founded in our courts; yet, as ſaid by Lord *Raymond*, may they be uſed as the opinions of learned men.

I am of opinion therefore, that the *ſtatute* of *J.* 1. is the rule to be followed in this caſe; and the intent thereof was to prevent the bankrupt's acquiring falſe credit: that for benefit of creditors in general, theſe goods ſhall be eſteemed his, and diſtributable as his; ſo that they muſt come under the commiſſion. Whether this is a wiſe proviſion, or no, in this ſtatute, is not for the determination of the court; for while it continues a ſtatute, it muſt be followed.

LORD CHANCELLOR.

I am obliged to the Judges for their aſſiſtance, and endeavours to give light to ſo intricate a caſe; which intricacy ariſes in reſpect of the want of a number of authorities, as to the conſtruction of this act of parliament, though made ſo long ago: but a greater intricacy occurs
(371) in reſpect of the conduct of *William Harveſt* in making theſe ſecurities. All the authorities, giving light to this, have been exhauſted by the Judges; and it would be miſpending of time, to repeat what has been ſaid. It is ſufficient therefore to ſay, I concur in the opinion delivered: but as this is a caſe of great expectation and conſequence, I will reduce the grounds to ſome general principle.

There ariſe two general queſtions. Firſt, whether any mortgages or conditional diſpoſition or conveyance of any goods and chattels are within the *Statute* 21 *J. c.* 19. *ſec.* 10 and 11, as it is by miſprint deſcribed in the ſtatute? Secondly, if any are, which are? A third has been made, by a diſtinction on the mortgage of *Harveſt*'s moiety in truſt for *Stevens*, whether that be within this clauſe?

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As to the firſt, I will not enter into a particular diſcuſſion and argument of two points made at the bar: the one, whether the enacting clauſe extends to all goods whatſoever in cuſtody of the bankrupt (whether his own originally or moving from others) or whether it is to be reſtrained by the preamble, and to extend only to goods originally the bankrupt's; which I will not argue? the other is, whether *choſes in action* are within this clauſe? Let the conſtruction of the clauſe, as to this, be what it will, whether to be confined or not to goods originally the bankrupt's, this caſe as to this point is undoubtedly within the act, becauſe it cannot be diſputed, but that all the goods now in queſtion were originally the bankrupt's; moved from him, conveyed and mortgaged by him. But I ſtrongly incline to concur with the opinion of *Holt*, that this clauſe muſt be reſtrained by the preamble, as Lord *Chief Baron* ſeems to do, and differ from Lord *Cowper*; though the decree made by him, was undoubtedly right. *Choſes in action* are properly within the deſcription of goods and chattels within this clauſe; and I will only add one argument, for the ſake of which I mention it, which is, that this conſtruction is ſtrongly warranted by the next preceding clauſe relating to bankrupts, who by fraud make themſelves accountant to the king to defeat their private creditors; which plainly ſhews, that the words *goods and chattels*, as uſed in this act, take in all kind of perſonal property of the bankrupt, whether in poſſeſſion or action only; which ſtrongly ſupports the conſtruction made by the Judges, and is agreeable to 12 *Co.* where it is held, that in an act of parliament *goods and chattels* take in *choſes in action*. The reaſon of the other opinion in the books ariſes from hence, that this queſtion has ariſen on a grant, or aſſignment, or bargain and ſale; not being ſuch goods and chattels as would paſs by that aſſignment or conveyance: but in an act of parliament, which can paſs any thing, they are always included.

(372)

I go on four general principles in the conſtruction of this act. Firſt, the aim and intent of the legiſlature was, that an equal proportion of the effects of the bankrupt among his creditors ſhould be attained as far as poſſible. Secondly, that to attain that end theſe acts of parliament ſhould be conſtrued beneficially for the general creditors under the commiſſion. Thirdly, it appears, the general view and intent of the proviſion, now under conſideration, was to prevent traders from gaining a deluſive credit by a falſe appearance of ſubſtance to miſlead thoſe, who ſhould deal with

with them. Fourthly, the legiſlature judged, they might do this by ſubjecting all the goods of the bankrupt, though conveyed to others, to the general creditors under the commiſſion; (y) becauſe where the vendee or aſſignee leave ſuch goods in poſſeſſion of the bankrupt as owner, he confides as much in the general credit of the bankrupt as that creditor, who has only taken his bond or note. It is in ſuch caſe put in the power of the bankrupt to ſell the goods next day; the former aſſignee could only have a perſonal remedy againſt the bankrupt. All theſe grounds go to the ſubſtance of the caſe, and not upon niceties; and hold in caſe of mortgage as well as an abſolute ſale: otherwiſe it would be contrary to the reſolution of *Stevens* v. *Sole*, and the opinion of Lord *Cowper*, in *Buckner* v. *Royſton*, and to his implied opinion in *Copeman* v. *Gallant*; and would overturn this part of the ſtatute, and reſtrain it to abſolute ſales. Traders inſtead of abſolute ſales would then make ſuch mortgages; and there would be greater opportunity; for traders might mortgage over and over again, as this caſe is a pregnant inſtance. As to the moſt material and operative expreſſion, the legiſlature has explained their own ſenſe, by putting the words *true owner* in oppoſition to *reputed*, not *ſpecial owner*; and then theſe laſt words can only mean a perſon, who by ſpecious acts of poſſeſſion, order and diſpoſition, gives himſelf an appearance of property, he has not really, (which is the preſent bankrupt's caſe) till the mortgage money is paid. Then it follows, that the mortgages to *Reynel*, *Skip* and *George Harveſt*, and ſo much of the aſſignment to *Stevens* as relates to the utenſils not fixed to the freehold, which are made a farther ſecurity to him, muſt be void within this clauſe, ſo far as they are claimed to be ſpecific liens. The diſtinction endeavoured has been anſwered; and the diſtinction moſt laboured, that a ſhare of a partner in a partnerſhip ſtock is only a ſort of proportion ariſing on the balance of the partnerſhip account and incapable of being delivered, would let in that falſe, deluſive credit (intended to be prevented) in all trades in partnerſhip, and would extend to particular goods in partnerſhip. (z) As to *choſes in action* compriſed in theſe ſecurities, where it is admitted none could paſs in equity, equity ought to follow the law in this caſe, if in any. Where property is eſtabliſhed by act of parliament, equity follows it, in like manner as

(373)

where

(y) *Secus* where the goods are not left in bankrupt's poſſeſſion, as a leaſe pledged, was carried into effect, againſt aſſignees of a bankrupt. 1 Brown, 269.

(z) 1 Brown, 125. 1 Atk. 171, 177.

where eſtabliſhed by common law; for if not, it would cauſe great confuſion; and it is always ſo taken on acts of parliament made concerning real and perſonal eſtate, regulating that kind of property, for which there is a ſtrong inſtance in the ſtatutes relating to papiſts; for, though ſubject to penal laws, equity regulates in the ſame way, by the ſame rule as the ſtatutes lay down concerning legal property.

The third and laſt point is in the conſtruction of *Potter*'s mortgage; which is ſaid to be directly as if made to *Stevens*: and, I think, upon the whole it would be ſo: though perhaps if it was nicely ſcrutiniſed, ſome difference might be taken: but whatever legal intereſt, that veſted in *Potter*; and the law would not have taken notice of the truſt, if the queſtion was at law: and therefore if this act of parliament has made it void at law, this court would never ſet it up contrary to law for the ſake of *Stevens*, becauſe he was a partner, but would let the law take place for benefit of the general creditors. As to any of theſe goods in that mortgage, which equity only could paſs, equity will follow the law; for as to the profits ariſing from trade and *choſes in action*, there could not be an equity upon an equity: equity would veſt them in *Stevens*; and it would undoubtedly be conſidered, as if the aſſignment had been directly to *Stevens*. And here the principal objection ariſes; it being ſaid, it veſted in *Stevens* as to theſe particulars, and that *Stevens* was partner then, and if he had not taken this mortgage, he would be intitled to have an allowance, out of what would be coming to *Harveſt*'s moiety, and would have a ſpecific lien on that moiety; and therefore *Stevens*, taking a mortgage of the other ſhare, would not be put in a worſe condition than without it. This was the moſt plauſible thing urged for the defendant; and would be right, if the foundation was right; but I diſpute their foundation; which muſt be, that the party ſo lending gains a ſpecial lien on the partner borrowing, and ſhould be allowed a preference to his ſeparate creditors: but for this there is no authority or precedent after a bankruptcy, it is a different conſideration, what a court of equity might do between the parties themſelves, while both remained capable of tranſacting for themſelves. But I might carry it further; for it is ſo after death of a partner, where his effects come to be diſtributed as aſſets. In the caſe of *Meliorucchy* v. *London Aſſurance Company*, the points determined are not material to the preſent: but there the attempt made was to ſubject ſtock after a bankruptcy to a debt

debt contracted to the company by a loan of money, and arguments were drawn from rules concerning partnerſhip: but it was not contended for, that in caſe of a partnerſhip that could be carried further. And the caſe cited by *Croft* (374) v. *Pike*, is as ſtrong as any negative authority can be; for there it was not attempted to give the ſurviving partner a right of retainer or bringing into the partnerſhip account a bond debt, ſo as to be preferred to others, but only as executor; and therefore the money taken by a deceaſed partner out of the partnerſhip ſtock, was allowed to be brought into the partnerſhip account, but the bond debt was not, becauſe a ſeparate loan and tranſaction. If then by a new determination now it ſhould be admitted, and that one partner by lending money to another in a ſeparate capacity, not relative to the partnerſhip, ſhould gain a ſpecific lien on the effects of the partner ſo borrowing, it would open a door to fraud, and ſo defeat this ſtatute; for then a perſon might be taken in as a partner into a moiety of a great ſtock and flouriſhing trade, and he may have a ſeparate credit on that confidence, and yet may not have any in reality of the property in that ſtock, but the whole may belong to others; which tends plainly to great fraud and impoſition on traders, and great miſchief. It has been ſaid, that great miſchief might ariſe to trade and credit from ſuch a determination as this, as tending to prevent making uſe of that credit perſons have to ſupport themſelves in trade, as they cannot make a ſecurity without expoſing their circumſtances to the world; and on the other hand it is contended, that the other conſtruction would in fact repeal the act of parliament, and let in a miſchief: ſome inconvenience might perhaps ariſe from a determination of this caſe on either ſide; but I agree with *Lee Chief Juſtice*, that, as this is a law, we muſt adhere to it; and while it is a law be bound by it; and if any inconvenience reſults from it, that is for the conſideration of the legiſlature. But this I will ſay, that as ſome inconvenience may be to particular perſons on one hand, great inconvenience may be on the other, by creating that appearance, as having the ſubſtance of which they remain in poſſeſſion, though they have not at all the real property: and that this was the intent of the legiſlature, I am clear: and I may go ſo far as to ſay, that the ſimplicity of thoſe times did not let in theſe large and airy notions of credit as of late; which, from the number of bankruptcies we have had of late years, is rather an evidence, that the departing from the rule this law has laid down, and giving way to theſe notions, has been rather a miſchief.

I agree

I agree then, that theſe mortgages cannot prevail as ſpecific liens and ſecurities, therefore as to the mortgages of lands and fixtures, they are not affected by the act of parliament: but what is affected by the direction therein is the aſſignment to *Stevens* (for *Potter* muſt be conſidered as truſtee for him) relating to any utenſils not fixed to the freehold. So alſo are all the four mortgages of ſeventh part by reaſon of the bankruptcy of *William Harveſt* made void by the ſtatute, and can create no ſpecific lien on the bankrupt's ſhare of partnerſhip ſtock debts and effects; but they muſt be conſidered only as general creditors. (375)

Ryall *verſus* Rowles, *February* 3. 1749-50.

Caſe 170.

THE cauſe coming on for further directions, Lord *Chancellor* directed, that as to 1600*l.* the balance of the debts due to the partnerſhip at the time of the bankruptcy received by *Stephens* or *Rowles*, his executor, the executor ſhould anſwer intereſt in ſame manner as on the other ſums, which are part of the partnerſhip ſtock; for the debts are part of the ſtock; and therefore as much reaſon, that when the money was got in, he ſhould be charged with the like value as in the ſtock in trade. Intereſt.

Another conſideration was as to 2000*l.* ſhort of the 7000*l.* which *Stephens* was to pay as a conſideration for the moiety of the ſtock in trade, when he was to be let into the partnerſhip.

(a) As to this, Lord *Chancellor* ſaid, the demand of the plaintiffs aroſe on a very bad tranſaction on the part of *Stephens* by exorbitant and uſurious intereſt taken by him; and therefore the plaintiffs had a right to have that ſum allowed. But the queſtion was, whether they ſhould have it as a diſtinct independent demand and to carry intereſt, or to be ſet off againſt the ſum reported due to *Stephens* as a debt due to him, though not as a mortgage. Where ſetting off debts allowed.

The executor inſiſted on a ſet off, becauſe by the act of parliament, where there are mutual debts one is to be ſet againſt the other; and that a creditor of the bankrupt on one

(a) Vide, Stat. 5 Geo. Cap. 30.

one hand, and debtor on the other, is not to be obliged to pay his whole debt to the aſſignees, and left to come under the commiſſion.

Plaintiffs inſiſted, this was not a caſe within that rule; becauſe no mutual credit was given; not being a debt ariſing from *Stephens* to the bankrupt by contract; but the demand, which the bankrupt and his aſſignees in his place, had, aroſe from fraud, and therefore not a mutual credit.

LORD CHANCELLOR.

The defendants inſiſt on a reaſonable rule. The bankrupt and his aſſignees were certainly intitled to have the benefit of this 2000*l.* with intereſt from the time it ought to be paid. But as to the general queſtion, whether this caſe is within the act for mutual credit, I am of opinion, it is; and that there is no diſtinction taken, on what conſideration it is, that debt, ſought to be ſet off, has ariſen.
(376) (b) There are ſeveral caſes, where demands have been ſet off againſt one another, that could not have been brought into the general account, if there had not been a bankruptcy: but wherever the court has found a demand on one ſide or the other, the court has always endeavoured, that one ſhould be ſet againſt the other; which is founded on the act, "That where there are mutual debts, *&c.*" This is a debt due from *Stephens* to *Harveſt*; a debt in equity, though poſſibly no remedy at law, becauſe the law admits not the party to an uſurious contract to have a remedy; not allowing an *Indeb. Aſſumpſit* for money had and received, though perhaps it may allow a proſecution on the act. But this court goes not on that rule but takes it to be a fraud and impoſition on a party in neceſſitous circumſtances.

Pyke

(b) 1 Wms. 325, 1 Atk. 228, 126.

Pyke *verſus* Pyke, *January* 31, 1749-50. Caſe 171.

PREVIOUS to the marriage of *J. Pyke*, articles were entered into, by which he agreed to ſettle an eſtate in *Ireland*, firſt to his intended wife, who was now admitted to have been then under age, as a jointure; and afterward part thereof for ſecuring the portions of younger children, and then the whole upon the firſt and every other ſon in tail: then that the wife's portion ſhould remain in the hands of the truſtees, till the conveyance or ſettlement thereby intended ſhould be executed. But it was agreed, that it was the intent, that to enable *J. Pyke* to execute the ſaid conveyance and ſettlement, the wife's portion ſhould be applied to the diſcharge of the incumbrances affecting the eſtate; and the overplus to be paid to *J. Pyke*, his executors and adminiſtrators. The marriage was had; but no ſettlement ever made. There was a ſeparation by agreement, upon recital of the bad circumſtances of the huſband, who went abroad and died.

Huſband by marriage articles agrees to ſettle an eſtate, and wife's portion to remain in truſtees till ſettlement. No ſettlement made, nor any eſtate applied, and huſband dies; the right to the portion ſurvives to her, and the iſſue not intitled to take it out of her hands.

This bill was brought by the wife, for the payment of this part of the reſidue of her father's perſonal eſtate, which was in the hands of the executor of her father, as the right thereto ſurvived to her upon her huſband's death.

No eſtate in *Ireland* appeared, and it was admitted on all ſides, that no ſettlement could now be made: but the defendants, children of the marriage, inſiſted notwithſtanding on being purchaſers under theſe articles, as an agreement for the diſpoſal of her eſtate, which was binding, and that they were equally intitled with the mother to have the benefit of it, although no ſettlement made; that the court ſhould decree an equivalent to them: or that an equitable proportion ſhould be found out; this being a loſing bargain, and both purchaſers.

LORD CHANCELLOR. (377)

The queſtion is, what is the right of the parties upon the circumſtances? It admitted on all hands, that this portion of the mother is by the ſurvivorſhip veſted in herſelf, if nothing appears, to take it from her; and ſhe has undoubtedly a right to ſue here, or for aught appears, in the Eccleſiaſtical court for this. But what is inſiſted on to bar

bar her of this, and to ſhew there has been a diſpoſition binding this money, is, the act upon her marriage with her late huſband. And it is certain, that in many caſes an agreement on the marriage of a woman for the diſpoſal of her eſtate will bind, as it is inſiſted for the defendants: but that is in caſes where the agreement is fair and reaſonable, and is done ſo as to prevent the huſband from becoming intitled to be maſter of that perſonal eſtate, which by the marriage would veſt in him. But if there is any fraud in the agreement, it will not bind the property of the wife; but there is no neceſſity to enter into that; and it is the ſame, as if the wife at the time of entering into the articles was of age. I queſtion whether there is any ſuch eſtate as in the articles. It ſeems to be only moonſhine, there being no proof thereof. But however that be, it muſt be taken, that no ſettlement can be made according to theſe articles. I am of opinion, that the children under the circumſtances are not intitled: and no court of juſtice can take this portion out of the hands of the mother or her truſtees, who are the repreſentatives of her father, unleſs ſhe has that part of the ſettlement agreed for her benefit made good to her. There have been caſes, where a marriage-agreement entered into, and part of the proviſion made for the iſſue of the marriage has been to raiſe from different parties; as from the father of the wife, and from the huſband, or father of the huſband; and either the wife, or iſſue of the marriage has been to raiſe from different parties; as from the father of the wife, and from the huſband, or father of the huſband; and either the wife, or iſſue of the marriage, all purchaſers under that, have brought a bill againſt the huſband, *&c.* for performance, who has inſiſted, he ought not to perform, becauſe the articles ſhould be performed entire, and that the father of the wife has not performed his part: the court has ſtill decreed, that the articles ſhould be performed as againſt the huſband, or his repreſentatives, and he ſhould take his chance to get a performance on the other ſide; becauſe they would loſe part, or the whole on the other. But that was a caſe, where the huſband or the repreſentatives of the huſband were not to receive any benefit from the other ſide, or to take any advantage for themſelves. And to carry this further, was cited for the defendants *Perkins* v. Lady *Thornton*, in which Sir *William Thornton* in conſideration of 1000*l.* was to ſettle a jointure on his wife: that ſhe was no party to the articles, but it was contracted between them, that ſhe ſhould have that jointure: that the money was not paid: Lady *Thornton* married *Perkins*, and brought a bill

June 1741.

to

to have the jointure, and that the court decreed it. Moſt of theſe caſes depend on a great many circumſtances; all of which I do not remember; but are different from this caſe. Lady *Thornton* there was not a party, ſhe performing only; and was only to perform by marrying, and therefore was intitled to her jointure, on the faith of which proviſion ſhe had married. But if the wife had contracted in that caſe to pay the portion, the court would not have decreed her to have that ſettlement, if ſhe did not pay that portion. But where the wife has contracted before marriage, in conſideration of the marriage, and a portion to come from herſelf; where the articles remain unexecuted, and the huſband has died, and the right to the portion has ſurvived to the wife, and the children brought a bill againſt her, there is no caſe where the court has ever taken that portion from her, unleſs they could put it in ſuch a ſhape, that ſhe ſhould have the benefit of her articles: for then the court would certainly do it, which otherwiſe it would be ſtrange to do, when marriage-agreements are to be performed entire. And it would be ſtrange, that the legal right to the portion in the hands of the wife ſhould be taken from her, and ſhe not to have the benefit of the other ſide. It ariſes from the fraud and miſbehaviour of the father of the children. The mother has as good an equity as themſelves, and has the law of the land on her ſide; having a right to ſue in the Eccleſiaſtical court, which is the law of the land in this caſe. Then they are purchaſers in equal degree, and the children have not a right to come againſt the mother to make good that failure on the part of the father. But ſuppoſing the court can do it in any caſe; whether in this caſe; it being here deſired of the court to decree an equivalent, and on the foot of that equivalent to take from the mother that legal property which ſhe has. The agreement is only, that the wife's fortune ſhould remain in truſtees till a ſettlement was made in purſuance; which ſettlement is of the huſband's eſtate, and her portion is to pay off the incumbrances thereon: but no ſuch eſtate appears. If there ſhould be a ſpecific performance, that eſtate muſt be found out: but an equivalent is deſired; that is not a ſpecific performance; but finding an equivalent for the children, in order to ſtrip the mother. But if I was to do this, and ſubſtitute this equivalent in the place of the articles, it would be in ſuch a caſe, as could not tend to the benefit of one ſhilling for the defendants. The equity would be then to lay out this money in land, and the arrears of this jointure, *&c.* muſt fall on the inheritance of this eſtate to be purchaſed, before (378)

the

the iſſue of the marriage can have the benefit of it, and would eat up the whole. The jointure muſt firſt be paid, and ſo far the caſe of Lord and Lady *Mohun* goes; where
(379) the opinion was, that whatever became of the iſſue of the marriage, the wife was intitled to have that made good to her, and then it would be no benefit to the children to make ſuch a decree. As to the equitable proportion inſiſted upon, it is difficult to ſet up that voluntary juriſdiction in this court. But if done, it has been where a ſettlement has been actually made, which is deficient. And if ſuch a ſettlement had been actually made, and the huſband got the portion, and ſpent and diſſipated it, the court might do it; becauſe it would be the beſt thing to do. But there is no inſtance where one right is entire, as the mother's portion is here, and in her own hands, that the court would take it from her, unleſs ſhe has what was ſtipulated for. That legal right therefore, which the mother has gained by ſurviving her huſband ought to prevail; and it being admitted that no ſettlement can be now made, purſuant to the intent of the articles; and it appearing that the growing payments and arrears of the plaintiff's jointure, exceed the value of the capital of her ſhare of the reſidue of her father's perſonal eſtate, it muſt be transferred to the plaintiff.

Caſe 172. Cray *verſus* Mansfield, *February* 7, 1749-50.

Sir *John Strange*, *Maſter* of the *Rolls*, in the abſence of LORD CHANCELLOR.

A deed executed by one juſt after coming of age to an agent conveying a reverſion for 180*l.* when a bounty or gift only was intended, but no fraud: the deed not abſolutely reſcinded, but the agent decreed to releaſe the covenants.

THE defendant had been ſteward or agent to the plaintiff's father's eſtate, and kept his court during his life; and after his death was appointed receiver of the infant's eſtate under the order of this court; for which he had a ſalary during the minority. This bill was to ſet aſide a conveyance, which the plaintiff admitted he executed to the defendant after coming of age; and which as framed and executed, was a conveyance from the plaintiff of the reverſion of ſome leaſehold eſtates that were out on lives, for the conſideration of one hundred and eighty pounds.

The caſe ſtated by the plaintiff for this was, that the defendant applied to him to add the life of the defendant's ſon, to one of the tenements; which he promiſed to do, directing the defendant to prepare a deed for that purpoſe, which

which was all he propoſed to have given him; frequently declaring that he would take no conſideration for it; ſaying he was ten times more obliged to the defendant, than the value of that: that the defendant brought to his lodging this deed ready ing oſſed, and offered it for execution: that he was impoſed on therein; being a haſty tranſaction, brought in a clandeſtine manner, and executed without the plaintiff's being appriſed of the contents: that the defendant carved for himſelf by inſerting that conſideration of 180*l.* when no eſtimate had been made, *Clarkſon* v. *Hanway*, 2 *Wms.* 205, is applicable. So *Pierce* v. *Waring*, where Mr. *Waring* was guardian of Mr. *Hall*, who lived with him; had horſes, dogs, *&c.* kept by him; and whoſe viſitors were all entertained at *Waring*'s own houſe, when *Hall* ſtood candidate for *Ludlow*. After coming of age, *Hall* made *Waring* a gift of 3000*l* *Eaſt India* ſtock, for his many kindneſſes and ſervices. *Hall* was ſatisfied with the gift, and did not diſpute it: but his repreſentative after his death brought a bill to ſet it aſide. There was no proof of impoſition: the only circumſtance was by conjecture, as if *Hall* did not know the ſtock was worth more. The Lord *Chancellor*, *November* 13, 1745, ſet it aſide upon the general principle; not upon the not knowing that it was worth more; but that it was a conſideration for which he would be allowed nothing in this court: that it was a dangerous example; and he would not endure a gift to be obtained on theſe circumſtances after the coming of age. Beſide, here the defendant is an attorney, and no gift during the tranſaction to a man in buſineſs will be allowed. In *Booth* v. *Walmſley*, a bond for 1000*l.* was obtained from *Japhet Crook*, to his attorney: on a bill by his repreſentative to ſet it aſide, Lord *Chancellor* at firſt diſmiſſed the bill, it being a voluntary gift, as a bounty, with his eyes open and knowing what he did. There was afterward a doubt on the general principle, and a petition to rehear; and on more mature deliberation his Lordſhip held, that it being a bond to an attorney pending the ſuit, it was of dangerous example, and like the caſes of marriage-brocage bonds, and ſet it aſide abſolutely. So did Lord *Talbot* in *Crook* v. *Hays*: as to *Langley* v. *Brown*, it depended on a variety of circumſtances: there an old man courting a lady deſired to have it put off, being under a bad habit of body. Her fortune was 1000*l.* and a ſettlement was made on her in the ſhape of a marriage-ſettlement; and the reverſion in fee to her whether the marriage took effect or not. His Lordſhip aſked whether the deed could poſſibly ſtand for more than 1000*l.* but, after

(380)

Poſt. Oldham v. Hand, 24 April 1751.

conſideration he went on this; that it was his plain intent to make this ſettlement on her, in regard of h isintention to marry her; therefore there was no ground to ſet it aſide; he intending it ſhould ſtand whether he married her or not: although it could not be a marriage-ſettlement, becauſe no marriage enſued. It went afterward to the Houſe of Lords on the ſame evidence and reaſons, and was affirmed.

For defendant. If the court was to ſuffer a guardian to take ſuch an advantage of his pupil as in *Pierce* v. *Waring*, it would deſtroy the confidence; it was there got from him juſt on his coming of age, and the ſtock was a great deal more than 3000*l.* As to *Japhet Crook*, he was at the very time under a proſecution for forgery, and no one would appear for him; ſo that he was abſolutely dependent upon his attorney, who undertook that very cauſe for him. (381) In the caſe of *Hays*, it was a ſum given to carry on that very cauſe: yet the court did not ſet it aſide as a ſecurity. The foundation upon which the defendant builds this deed, is not any particular ground or reaſon he had to make this demand on the plaintiff; only deſiring to become a purchaſer of it at a reaſonable price: although this is a very imprudent and improper deed under the circumſtances of its being accepted by the defendant as a bounty to be executed at that time: yet the defendant was not quite ſure whether the plaintiff would not repent of his generoſity in ſaying he would give it; and therefore prepared the deed on the foot of a purchaſe. The defendant had done the plaintiff ſervices during his minority, and this reverſion upon ſo many lives, is not a matter of great value.

Maſter of the Rolls.

No doubt but that if on the evidence, the court was ſatisfied there was this impoſition upon the plaintiff, the power of the court would be very properly exerciſed in ſetting aſide ſuch a deed: but the court will rather preſume that things were tranſacted fairly, unleſs the contrary appears; and there is no evidence of this particular impoſition upon the plaintiff, which is made the ſtreſs and foundation of the bill: no evidence of the application for the adding the life of the ſon only in one tenement; nor any miſrepreſentation to the plaintiff of the circumſtances or value of it at the time of the tranſaction. It is plain from the whole, that the plaintiff knew ſomething more was contained

contained in the deed: and there is a circumſtance in the manner of the execution, of no very great weight indeed, but which I will take notice of to ſhew no ſurpriſe on the plaintiff was intended; that is, its being ſealed with plaintiff's ſeal, and not brought ready ſealed to his houſe: there is no ground therefore to ſet it aſide upon the particular fraud charged. But there is another proper head of equity for the conſideration of this court, which will always hold a very ſtrict hand over all deeds, purchaſes and conveyances obtained from young gentlemen ſoon after coming of age by perſons preſuming too much on the confidence repoſed in them, and drawing them in to execute deeds. If the defendant's ſalary had not been a reaſonable ſatisfaction for his trouble, upon application to the court it would have been increaſed; but he contented himſelf ſo till the plaintiff came of age. No evidence of any draught laid before the plaintiff, or that his friends were acquainted with it: the deed ſeems to have been brought to the plaintiff with one hundred and a blank, which was afterward filled up with eighty, and which appears to have been added with different ink, and a different hand; which perhaps was occaſioned by the uncertainty of the value of the reverſion. Although no fraud, and the plaintiff not (382) impoſed on by having a deed put into his hands of which he was not appriſed; yet it was certainly very imprudent and dangerous to be ſuffered, that the perſon who is to take the benefit of this grant, and who had that relation to the plaintiff ſhould not out of a reaſonable caution have adviſed the plaintiff to have laid this deed before ſome common friend or third perſon. The deed appears improper for the plaintiff to have executed, ſuppoſing he had knowledge of the contents; and it would have been better for the defendant to have ſtaid his hand, and ingroſſed another according to the real truth of the tranſaction; and then the plaintiff had not executed a deed containing very improper covenants on his part, and a falſity on the material part, that it was a ſale for valuable conſideration. That there was, or was deſigned to be, any money paid, is now given up by the defendant himſelf, who diſclaims its being a purchaſe by him: and he had warning enough to have framed it another way, by the plaintiff's declarations that it ſhould be a gift. If then he has acted incautiouſly, who can he blame? In *Clerkſon* v. *Hanway*, great ſtreſs was laid on what appeared to the court on the face of the deed; though indeed there was another circumſtance, not applicable to this, which would have ſet that aſide. But to go farther, though the deed had not con-

tained that falſity, but was framed as a bounty, conſidering the light in which he ſtands (which will always weigh with this court) concerned for the plaintiff in his affairs to the time, for fear of ſuch a precedent I ſhould have inclined to have interpoſed. But before I give my final opinion; if ever there was an inſtance of a voluntary deed, appearing in every part not at all to tally with the deſign and nature of the grant, nor importing the truth of the tranſaction, but where one intended a bounty, the other imprudently frames it ſo, as againſt all ſucceeding to the eſtate it might appear a ſale and grant for valuable conſideration; I deſire to know if ſuch a deed was eſtabliſhed; for if ſo, I ſhould incline to eſtabliſh it, becauſe I acquit the defendant of the fraud charged. I lay no weight on the ſervices during minority; which ought not to be taken into conſideration. The ſmallneſs of the value is, I own, a circumſtance inducing me to think there was not a deſign fallaciouſly to draw in the plaintiff to execute a deed conveying theſe eſtates; for had the defendant meant ſuch a fraud, he would rather have taken ſomething in preſent of greater value to him, than ſuch a remote reverſion But however the *majus* or *minus* is of no conſideration where it was ſo executed; unleſs therefore ſome ſuch inſtance is ſhewn, I incline that the deed ſhould not ſtand, but be delivered up to be cancelled.

(383) *For defendant.* There is no caſe to that purpoſe; for that muſt be where the bill is by a perſon claiming under the deed to have the benefit thereof. It is a known diſtinction between a bill to ſet aſide a legal right, and a bill to carry a deed into execution; in which latter caſe, the court expects it ſhould be fair in every reſpect; in the other, if not *in toto*, will let it ſtand ſo far as it is fair.

Maſter of the Rolls.

I only fear the example, and will conſider further; and if I could find the court ever refuſed to interpoſe to ſet aſide a deed under ſuch circumſtances, I ſhould be glad of it.

His honour afterward delivered his opinion in the ſame term.

This deed, not being as claimed by the defendant, is not, with regard to the manner in which it is executed by the plaintiff, proper to ſtand out in that light againſt him. But if the court can relieve this caſe from that difficulty,

it

it would be hard to ſet it aſide merely from the circumſtance of drawing the deed. The method occurring to me to prevent this from remaining ſuch a title out againſt the plaintiff, is to diſmiſs the bill, ſo far as it ſeeks entirely to ſet aſide the deed, and to have it delivered up: but that the defendant ſhould execute to the plaintiff a ſpecial releaſe, reciting the whole of this deed, that no conſideration was advanced, but merely voluntary; and then to decree that the defendant ſhould execute to the plaintiff a releaſe of all the covenants contained in the deed, (which covenants were proper to be made from vender to vendee, but very improper in a grant of bounty) which is taking a middle way between ſetting it aſide, and letting it exiſt totally. I do this merely becauſe I am not ſatisfied that the bare manner of executing this deſign of the plaintiff, if the court can deliver it from that circumſtance, is a ſufficient foundation totally to reſcind it.

This to be at the expence of the defendant; but no coſts on either ſide.

Travers *verſus* Buckly, *February* 8, 1749-50. Caſe 173.

LORD CHANCELLOR, *and Sir* John Strange, *Maſter of the Rolls.* (384)

A wife appears and prays time to anſwer ſeparate from huſband, who lives abroad, and ſhe has an order for that: the court will not afterward ſet it aſide.

MR. *Cantillon* having died in 1734, a will of his was found in the *Eaſt Indies*, in 1736, and brought to *England*. The executors renouncing, adminiſtration with the will annexed was granted to the teſtator's widow and her ſecond huſband, during the minority of the teſtator's daughter. A bill was brought by the executors of Lord *Powis* againſt the huſband and wife as joint adminiſtrators; which adminiſtration determined ſince the filing the bill upon the daughter's coming of age. The defendants living in *France*, they were ſerved the 26th of *October* laſt with a *ſubpœna*. The wife coming to *England*, was taken up on proceſs of contempt iſſued againſt both: gave a bail bond for her appearance; and appeared for herſelf only: afterward ſhe applied for time to anſwer ſeparately, and obtained an order for that purpoſe.

It was moved, that the bail bond given by her to obtain her liberty on being arreſted for want of appearance, and alſo

alſo her appearance might be diſcharged: which being adjourned for conſideration, and to have precedents looked into, the motion was now made again, upon two points: Firſt whether the taking her up on the attachment was regular? Secondly, if not, whether the irregularity was waved by her appearance?

Firſt it was inſiſted upon as irregular; for that the huſband and wife being one perſon, ſhe cannot appear for herſelf; upon which principle the caſes go; for where this court compels a woman to appear, and put in a ſeparate anſwer, it is becauſe the huſband is only for conformity joined; the demand being againſt her in reſpect of her ſeparate eſtate, and the huſband is not affected in conſequence of the decree: *Dubois* v. *Hole*, 2 *Ver.* 613, and *Bell* v. *Hide*, *Chan. Pre.* 328. this court, though courts of law do not, conſidering her in ſuch caſe as acting in a ſeparate capacity, as to the making grants, *&c.* of her ſeparate property. And the reaſon of the thing warrants this diſtinction; for in thoſe caſes there is ſome fruit from the decree: here is none; for her anſwer cannot be evidence againſt any other, nor will it conclude herſelf, ſhe having no intereſt in this, but what her huſband has; adminiſtration being granted to both: nor will it bind any thing in the account, nor bind the huſband: nor are they proper to be made defendants in this ſuit, it being a limited adminiſtration, and the abſolute adminiſtrator is the perſon to call them to account; otherwiſe they might account to every creditor: though upon particular circumſtances of colluſion, it might be brought againſt them, as againſt any other debtor. Secondly, though there is a general rule that the irregularity is waved, the objection not being made in time, (and it is ſo in criminal proceedings) yet is there a clear diſtinction. In courts of law a general appearance waves any objection to the form of the writ, becauſe advantage might have been taken of it, as abatement is waved by pleading in chief. So if the objection is in point of proceſs; ſo in the Admiralty and Eccleſiaſtical courts, there is an opportunity to object to appearing. But in this court appearance is firſt neceſſary, before any (385) complaint of the irregularity of ſervice can be made; for by the forms of this court there can be no appearance by proteſt, as in the civil law courts, but it muſt be generally. A defendant having been taken up on an attachment iſſued on *Sunday*, appeared, and moved to have the proceſs ſet aſide on that account; to which it was objected, there was no irregularity, the *Rolls* formerly ſitting upon *Sunday*:

but

but ſuppoſing there was, that the appearance cured it. Sir *Joſeph Jekyl* held it irregular, and that notwithſtanding appearance, the defendant might apply to ſet aſide the proceſs, and did ſet it aſide. In *Burton* v. *Malone*, *March* 19, 1740, the defendant, againſt whom a decree was obtained and bill taken *pro confeſſo* upon the late act of parliament of going beyond ſea to avoid proceſs, had been ſeveral years out of the kingdom before the decree obtained; which was known to *Hacket*, the attorney concerned in procuring the decree: there was an appearance, and an application afterward to ſet it aſide: to which it was objected that the voluntary appearance waved any error in the proceſs, and therefore whatever was the fate of the decree, the appearance muſt ſtand: *Lord Chancellor* held there, that appearance waved errors in ſeveral things, as in criminal caſes, but was of opinion, that if a perſon was unduly compelled to appear by wrong practice, the court might diſcharge ſuch appearance; and if that practice was with the knowledge of the party, would cenſure him, and ordered *Hacket* to be committed: ſo in the preſent caſe, where the defendant's wife has been under this compulſion to appear and give the bail bond.

LORD CHANCELLOR.

The order for commitment in that caſe depended on the ill practice. The queſtion now is, whether it is conſiſtent with law and the courſe of this court, after ſhe has appeared and prayed time to anſwer ſeparately, and had an order for it, to diſcharge her from theſe acts of her own? and I think not. The court takes all methods, and extends its proceſs to aſſiſt parties coming at their relief, notwithſtanding ſuch reſidence beyond ſea: and it is more neceſſary to do this here, than in courts of law where actions are more ſimple. Here it muſt be againſt a great number of parties; and therefore the court admits a ſuggeſtion in the bill, that a perſon who is a material party is reſident beyond ſea, and cannot be compelled to appear; and to proceed on that allegation, provided proved in the cauſe: which courts of law have no notion of. It appears alſo from two caſes cited, that it is reaſonable for the court to extend its juriſdiction as far as poſſible, that proper decrees might be made. It is true that in *Dubois* v. *Hole* on the face of the bill there was ſome ſeparate property in the wife; but I do not underſtand it as ſtated in 2 *Ver.* I do not remember that that caſe has been mentioned to have gone upon that reaſon of Lord *Cowper*; but always put on this,

this, that the wife had appeared, and therefore Lord *Cowper* would not relieve her againſt that. Indeed there does not appear here any ſeparate intereſt of the wife; but ſhe has appeared, and obtained leave to put in a ſeparate anſwer abſolute and unconditional: the effect of which appearance is ſaid not to be the ſame as at common law; but this is the firſt time I ever heard of ſuch diſtinction. Appearance ſalves no error in the original writ, but error in meſne proceſs only. A party may appear voluntarily on a bill in this court; ſo he may at law upon an original writ, without any proceſs. And as to that caſe, cited without a name, before Sir *Joſeph Jekyl*, there muſt be ſomething more in it; for as ſtated, if it was nothing but that the teſte was on *Sunday*, I ſhould be of a different opinion; becauſe by appearing the objection was put out of the caſe. I never before heard of the doctrine, that after appearance the party might complain of the irregularity of the ſervice in a *ſubpœna*; for if the label only be left with a ſervant of the family, after appearance the court will not ſet it aſide, the irregularity being waved. But this is ſtronger, being the ſame as after imparlances at common law: and it is an admiſſion on her part, that there is ſomething ſeparate from her huſband, to which the wife is to anſwer. But it is ſaid, the appearance of the wife is abſolutely void in point of law, and therefore every thing built on it falls to the ground, becauſe the wife can in no caſe appear without the huſband; which I deny, both in the proceedings in this court and at law; for there are ſeveral caſes at law where appearance by a wife without the huſband is good: as in *Tot.* 157. *Weſtdean* ——— which ſhews that this court exerciſes ſtricter juriſdiction over married women, than courts of law. And *Dyer* 210 in the marginal notes (which are well known to be of *Chief Juſtice Treby*'s writing) ſhews that the appearance of a *feme covert* is not in every caſe void, even at law: ſo in *Sti.* 475. *Lee* v. Lord *Baltimore*, which caſe was undoubtedly going a great way: But a more modern caſe is in *Sal.* 114. *Carpenter* v. *Fauſtin*; where *Holt* ſays common bail ſhould have been filed for the wife; which ſhews that appearance by a wife at law is not void; for common bail in *B. R.* is common appearance, which proves the wife may appear, and may be compelled in many caſes. It is true the proceedings cannot be carried on till the huſband appears, or ſomething is done to ſupply it, as by continuances: ſo here it will be another conſideration when the cauſe comes to proceed, what the court can do unleſs the huſband appears: but that does not extend to diſcharge her appearance, and that order made: and

Appearance ſalves error in meſne proceſs only.

Appearance by wife without huſband may be good.

and when courts of common law go ſo far, it is a further reaſon why I ſhould not be too ſtrict in the courſe of this court. But the point of this caſe is on her appearance and the order made. (387)

The Maſter of the Rol's being preſent concurred in opinion that the defendant was precluded from taking this objection now. If any act ſhewing an acquieſcence and defence of the cauſe, the court always ſays it is too late to ſet it aſide, here is not only appearance but an application for time, and that caſe in *Sal.* is a very ſtrong authority in the preſent caſe.

Whitfield *verſus* Fauſſet, *February* 10, 1749-50. Caſe 174.

THIS cauſe came before the court on a bill to have an account of the arrears and a decree for the growing payments of a rent-charge of 20*l. per ann.* as a purchaſe by the plaintiff for valuable conſideration: ſetting forth the rent as created by a marriage-ſettlement by leaſe and releaſes limited to uſes, and dated 1692, to the uſe and intent that the heirs of the body of the wife and their heirs might receive this rent payable quarterly, with clauſe of diſtreſs; and that the land was thereby limited, ſubject to that rent-charge, to the huſband and his heirs: that in the life of the father and mother (after whoſe death their two ſons were intitled to the rent-charge in *Gavelkind*, it following the nature of the land) the plaintiff took a conveyance by way of purchaſe from the two ſons by deed without fine: farther ſtating that the deed creating the rent-charge was either in the hands of the defendant, or concealed by ſome of them, or loſt; and therefore praying a diſcovery of the deed, that if they have it, they may produce it, or elſe a decree as above againſt the tertenants: inſiſting that though the ſons had nothing in them which they could convey in point of law, as an heir apparent cannot in the life of his father, yet a court of equity will ſupport ſuch a conveyance by way of aſſignment or agreement; as in *Theobald* v. *Deſay*, and *Beckley* v. *Newland*, 2 *Wil.* 182.

What relief in equity a purchaſer of an equitable title to a rent-charge may have againſt the owner of the land.

There were two ſets of defendants material to be conſidered: *William* and *John Caſſinch* the two ſons from whom the plaintiff derived the purchaſe, and who admitted it: and three *Fauſſets*, *viz.* the father, his wife and ſon; who the plaintiff inſiſted muſt be preſumed to have notice from the

the deeds being in the hands of their family. The father's title was as purchaſer of this eſtate by his mother for valuable conſideration, and without notice: that his mother afterward conveyed this eſtate to him voluntarily: that he on his marriage ſettled it on himſelf for life, then to his wife for her jointure, and to the ſons of the marriage; under which ſettlement the wife and ſon inſiſted on being purchaſers for valuable conſideration without notice, and therefore not to be hurt in a court of equity.

(388)

To deduce this title, the father ſaid that in 1705, there was a mortgage made by deed and fine for 500 years; which fine had the effect to bar and extinguiſh this rent-charge: that afterward an aſſignment was made of this mortgage, and in 1716 a conveyance for valuable conſideration to his mother; and the mortgage-term was aſſigned to him to attend the inheritance free from any equity of redemption. So that either the fine had extinguiſhed it; or elſe they ought not to be hurt in a court of equity, apprehending they had purchaſed the whole intereſt in the eſtate: that they were not bound by the admiſſion in the anſwer of the *Caſſinches*; and that it was an odd purchaſe from the ſons, when they had no right or title to the rent, as the heirs of the body in the life of their father and mother, who both lived to be very old: and that a poſſibility cannot be given appears from *Hob.* 45, 2 *Ver.* 563, 2 *Bul.* 123, *Roberts* v. *Roberts*. But ſuppoſing it a good grant of an annuity, yet this court ought to ſend the plaintiff to law, and not relieve him here; for at law the plaintiff may declare on the deed, and afterward give parol evidence of the loſs, in order to excuſe the making *profert* of it. As appears from a caſe now depending for judgment in *C. B.* of the *King* v. *Hays*; in which a grant is actually ſet out though loſt; which ſhews it to be looked on as the conſtant practice of that court to ſtate in the pleading that the deed is loſt, and to recover.

Where defendant's anſwer in another cauſe may be read.

The anſwer of the defendant *Fauſſet* in another cauſe was offered as evidence, wherein he admitted there was ſuch a ſettlement made, but as to the uſes he referred to ſuch proof as the plaintiff in that cauſe ſhould make.

The reading whereof was objected to; for that being an anſwer in another cauſe, (c) not now at hearing, it was read only as collateral evidence, not as a judicial confeſſion, as

(c) On an iſſue directed out of this court, defendant's anſwer directed to be read to the jury. 2 Vol. 42.

as the anſwer in this cauſe would be, and that to let in any kind of collateral evidence there ſhould be ſome proof of the deed.

LORD CHANCELLOR

Was in ſome doubt; for there ought to be ſome proof that the deed was loſt: ſome ſuch foundation laid firſt: but ordered to be read, yet ſubject to be concluſive or not.

The plaintiff having ordered a ſearch to be made had found a draught of the deed, but not the deed itſelf; the reading of which was next objected to, becauſe there was not ſufficient evidence that the deed was loſt.

(389)

LORD CHANCELLOR.

A deed loſt may be proved by circumſtances, firſt ſhewing that it once exiſted, and next that it is loſt or cannot be come at.

The rule is that the beſt evidence muſt be uſed that can be had, firſt the original; if that cannot be had, you may be let in to prove it any way, and by any circumſtances the nature of the caſe will admit. This extends not only to deeds, but to records; ſo far I mean as they may be given in evidence to a jury; for in point of *profert*, it is another thing. But for this the law requires a proper foundation to be laid; and two things are neceſſary. Firſt, to prove that ſuch a deed once exiſted; and there is ſufficient evidence that ſuch a deed, to a certain intent, did once exiſt, by the anſwer that has been read; which I do not rely on as evidence of all the uſes of the deed, but as an admiſſion that ſuch a deed and uſes, ſomething of that nature, once exiſted. The next ſtep is to ſhew ſome ground that the deed is loſt; or, being in his adverſary's hands, cannot be come at. What I go upon is, that there is ſufficient evidence to trace this into the hands of the defendant, who is the purchaſer of the eſtate, and has himſelf produced the leaſe for a year, which naturally accompanies the releaſe, and makes part of the ſame conveyance. The parties to a leaſe for year are only thoſe by whom, and to whom the eſtate is granted; not thoſe who take by way of particular uſe. This then is a ſtrong foundation to let the plaintiff in to read this draught, which is ſtrongly proved: and there is a caſe in 1 *Mod.* where the copy of a deed not atteſted was ſuffered to be read, upon proof of a loſs by fire, but without further proof.

Upon reading it, the limitation was to the uſe of the father and his aſſigns during his life, without impeachment of

of waſte; and from and immediately after his deceaſe, if his intended wife ſhould ſurvive, and have iſſue of her body then living, that ſhe ſhould receive, take and enjoy for her jointure, and in lieu of dower, a rent-charge of 20*l.* *per ann.* payable quarterly; and from and immediately after the deceaſe of them both, and of the longer liver, the heirs of the body of them, and their heirs, ſhould take one annuity of 20*l.* *per ann.*

LORD CHANCELLOR.

Before I pronounce my decree, I would be ſatisfied of this new practice, that a perſon may declare or avow upon a deed, of which he ought to make *profert*, ſetting forth that it is loſt; for if ſo, there is no need to come into this court upon a loſt bond, ſince you may declare upon it; which will make a great alteration in the proceedings of this court. Therefore let it ſtand for judgment.

(390)

February 20, LORD CHANCELLOR delivered his Opinion.

Upon the proof the parties have entered into, it plainly appears there was this rent-charge originally created in 1692, though the deed creating it is not produced, and ſaid to be loſt: and it appears to my ſatisfaction that the contents of that deed are properly proved by the contents of the draught: there ſeldom happening ſo good proof of the contents of a deed loſt. There is clear evidence that the mother of *Fauſſet* had notice of this ſettlement, and creation of this rent, and ſo had the mortgagee in 1705. The defendant himſelf producing the very leaſe for year upon which that releaſe, whereon the rent ariſes, was founded; there being the very ſame deſcription *literatim*, and it recited in all the conveyances.

There are three queſtions on this caſe. Firſt, whether this rent-charge is now exiſting, or is barred or extinguiſhed in point of law? Secondly, ſuppoſing it exiſting, whether the plaintiff has acquired any right thereto by the purchaſe on which this bill is founded? Thirdly, if he has, whether he is intitled to be relieved concerning it, and what that relief ought to be?

As to the firſt, it depends on the creation of the ſettlement and operation of the fine; and indeed there is ſomething

thing very particular in the frame of the marriage-ſettlement and creation of the rent. The principal queſtion upon which it will turn is, whether by the deed of leaſe and releaſe there was one rent only, or two diſtinct rents of 20*l. per ann.* created? It is by way of uſe, and exactly the ſame rent which is limited before; and though it is not ſaid the ſaid *rent*, the queſtion is, whether it is not a limitation of the ſame rent, notwithſtanding there are no ſuch words of reference? The great objection to it is, that poſſibly the wife might have died in the life of her huſband; and then no rent would have ariſen to her for a jointure, ſo that it would have a different commencement from what it would otherwiſe have had: but though a difference in words it is exactly the ſame. Yet I incline to think theſe are two diſtinct rents, from the diſtinct manner of creating them: but this being a queſtion at law, I have no right to bind the defendants without letting them have the judgment of a court of law, unleſs there is ſome other reaſon. It is plain that the mother of *Fauſſet* intended to purchaſe the whole intereſt, and that it was apprehended this rent-charge was barred by the fine. If there were two rents, then the fine would be no bar to the rent to the heirs of the body; that being in nature of a ſpringing uſe of the rent, which was not then ariſen, but a mere poſſibility, and no perſon capable of entering, ſo as to avoid the fine within the ſtatutes of *non-claim*; and there cannot be a bar ſo long as it is in poſſibility. If but one rent, and this limitation to the *heirs of the body* is conſidered as a further limitation of the rent-charge created, then the mother was tenant in tail of it; for the word *heirs* ſuperadded to *heirs of the body* in a deed, have no operation at all: and then though it was a rent-charge *ex proviſione viri*, yet the huſband joining in the fine, I ſhould be of opinion it was well barred: and that notwithſtanding it was out of land, and the fine was not of the rent, but the land, which will not alter the caſe; for which, if it was neceſſary, there is an authority in *Carter* 22, *Taylor* v. *Shaw*, that a rent-charge is gone by a fine of the land; which is this very caſe. This is on a ſuppoſition that it ſhould be taken as one rent.

Fine cannot bar a poſſibility.

A rent-charge barred by fine of the land out of which it iſſues.

As to the ſecond queſtion, the plaintiff claims as a purchaſer for valuable conſideration: and it is an odd purchaſe, and not to be encouraged; becauſe it being in their mother's life, the vendors were not her heirs; not having it in actual poſſibility: an odd and unuſual expreſſion of Lord *Hobart*, *page* 45. But he meant that it was a kind of double poſſibility; the rent-charge might never ariſe at all,

all, or if it did, the two ſons at the death of the mother might not be heirs of the body to take it. If they had died in the life of the mother without iſſue, the rent had been gone: if they had left iſſue, other perſons would be intitled to take it by purchaſe. Nothing paſſed therefore by that conveyance in point of law; it being by deed, and no fine; which if it had been levied of this rent, and they had ſurvived their mother, as againſt them it would have operated by *eſtoppel*, binding them and their iſſue. It is true, in a court of equity a *choſe in action* maybe aſſigned, and a poſſibility which has been for a valuable conſideration: and many tranſactions have been eſtabliſhed in equity, which could not at law, and decrees obtained; and therefore, though the admiſſion of the *Caſſinches* is not evidence againſt the *Fauſſets*, againſt the *Caſſinches* it muſt be taken to be good; and they will be bound by their agreement: ſo that the conſequence is, as againſt them the plaintiff has an equitable right to this, and is intitled to have the benefit of it decreed.

Choſe in action, or poſſibility aſſignable in equity. And no particular form requiſite. Ante, 332. 2 Vol. 6.

Then as to the third queſtion: and the plaintiff, being intitled to be relieved againſt the *Caſſinches*, is intitled to have a decree to compel them to make a further aſſurance to him; which they are bound to do in equity, and alſo to compel them to permit him to make uſe of their names as his truſtees to recover the arrears at law. This brings on the conſideration what further relief the plaintiff is intitled to: whether any decree againſt the *Fauſſets?* As to which the plaintiff having purchaſed only an equity from the *Caſſinches*, I am of opinion that purchaſe ought not to put the defendants, the *Fauſſets*, the owners of the land and purchaſers thereof for valuable conſideration, in a worſe condition, or make them liable to a different remedy than they would have been in reſpect to the *Caſſinches*, the original owners of the rent. There may be caſes where a perſon may be intitled to claim an equitable right to relief againſt other perſons from the nature of the caſe. But that is not the preſent caſe; for it operating by way of agreement in equity, the *Caſſinches* are to be conſidered as the plaintiff's truſtees, and the plaintiff therefore has a right to compel them to permit him to uſe their names to ſue at law, which is the common caſe. For if there is a purchaſer of an eſtate by voluntary conveyance or agreement, the truſtees having the legal eſtate will not intitle to come into

(392) Purchaſer of an equitable title to a rent-charge muſt try it at law againſt the owner of the land, claiming in contradiction thereto.

into this court againſt other perſons claiming in contradiction to his right. As to them, it is a legal title, and it muſt be tried at law on demiſe of the truſtees: (e) and ſo the plaintiff is intitled to take his legal remedy for this rent.

But I muſt diſtinguiſh on this part between the *Fauſſets*, all claiming to be purchaſers for valuable conſideration without notice; for as to the father, there is clear proof of notice of this ſettlement and creation of the rent; as appears on the recitals of his own conveyances, and in part by his own admiſſion, and producing the very leaſe for year, which makes part of this conveyance, by which the rent-charge is created. But as to the wife and ſon, it is a different conſideration, and not ſufficient evidence of notice to affect them; for the ſuſpicion from the deed's being in the hands of the family is not ſufficient; for ſuch a ſettlement as the father made, might be made by the apparent owner, without looking into the deeds; and if ſo, it amounts not to (f) notice, unleſs ſomething further is ſhewn. What will amount to notice.

But if no more in the caſe, ſtill the plaintiff ought to be left to his remedy at law, againſt both defendants, and therefore inſiſts farther he has another remedy againſt the *Fauſſets*, ariſing from the loſs of his deed, the nature of the caſe, the neceſſity he is under, if he was to diſtrain and avow in *replevin*, to make a *profert in cur.* of this deed.

The loſs of a deed is not always a ground to come into a court of equity for relief; for if there was no more in the caſe, although he is intitled to have a diſcovery of that, whether loſt or not, courts of Law admit evidence of the loſs of a deed, proving the exiſtence of it and the contents, juſt as a court of equity does. There are two grounds to come into equity for relief, annexing an affidavit to his bill. Firſt where the deed is deſtroyed or concealed by the defendant; and whenever that is the caſe, the plaintiff is intitled in this court to have relief upon the reaſon in Lord *Hunſdon*'s caſe in *Hob.* Another is where the plaintiff cannot recover at law without making *profert* of the deed in pleading at law. If a man has loſt a bond, he is intitled to come into equity not only for a diſcovery, but to have a decree Where on the loſs of a deed you may come into equity.

(e) In the caſe of quit rent, where the party has a remedy at law, that court will not relieve. 1 Brown 201. 1 Atk. 598. 2 Brown, 61.

(f) Which ought not to be conſtructive, but ſuch as will make an impreſſion on the memory. 2 Vol. 370.

decree for payment; becauſe he cannot declare without making *profert*, the defendant being intitled to *oyer*. It is to be conſidered then whether this caſe is within either of theſe two general grounds. As to the firſt there is not ſufficient evidence to proceed on that. There might be ſome ſuſpicion from the defendant's producing the leaſe for a year; but that is only ſuſpicion, and indeed the very cauſe of it takes off part of that ſuſpicion; becauſe if done with intent, it would be fooliſh not to have deſtroyed the other part of the releaſe, but as to the other ground, the defendants inſiſt the plaintiff may do ſo if he makes diſtreſs for the rent in the name of the *Caſſinches*, (for at law he cannot do it otherwiſe) that he may avow, and aver the deed to be loſt, and ſo be excuſed from making *profert*. There is no book, caſe, printed entry, or even modern authority, where that has been eſtabliſhed to be good pleading. But in *Bloodwink* v. *Oſborn*, *Trin.* 22 *G.* 2. in action in covenant for rent in arrear, there was a long title to the rent, created in 1656, ſet forth; and then a dereignment to the title to the rent brought down in the declaration; and in all the material deeds it was ſet forth that the deed was by unavoidable accident deſtroyed by fire: to this the defendant pleaded two pleas, which were two iſſues on the title: it was tried before *Juſtice Birch*, *Trin.* 1748, and a verdict for the plaintiff; which is the whole of that caſe, and is no authority for this pleading; for the defendant took iſſue; ſo that it was too late to take advantage of it; for it ſhould have been demurred to with ſpecial cauſe, and ſhewn. As to the caſe of the *King* v. *Hays*, in *C. B.* in *quare impedit*, it is not yet determined; therefore if it depended on this I never would ſend a plaintiff to law, who comes into the court on a plain equity, frequently admitted on the loſs of a deed, to try his chance whether the judges would eſtabliſh this pleading. The judges ought indeed to be *aſtuti*; but the allowing this in pleading will put the defendant or plaintiff in *replevin*, under great difficulty; which is to be conſidered in the letting ſuch new inventions into pleading: therefore I will not give countenance to it before it is eſtabliſhed by the judges. The only caſe having a tendency to this, is in 3 *Lev.* 82, *Carver* v. *Pinkney*, where the court held a declaration good, *quod* defendant *penes ſe habet*, without ſhewing the indenture. But there was a ſpecial reaſon there, which is not here, *viz.* the ſtatute 29 *C.* 2. of *augmentation*, expreſsly enabling the vicar, *&c.* to take a diſtreſs, or bring an action of debt: the opinion of the court was, that the plaintiff was enabled to ſue by the ſtatute, and might there excuſe *profert*.

Where *profert in cur.* is neceſſary, and where it may be excuſed.

But

But this is not the ground I go on, but on another: I am of opinion the plaintiff may ſue in the name of the *Caſſinches* without *profert*. This is a conveyance on the ſtatute of uſes; and the owner of the rent-charge, abſtracted from the ſtatute, has no right to the poſſeſſion of the deed or counterpart; which has been judged a reaſon to excuſe the plaintiff in *debt* or *covenant*, or the *avowant* in *replevin* from producing the deed in court, and may plead it without *profert*. *Dy.* 277, *P.* 58. *Eſtoff*'s caſe, *Cr. J.* 217, Lord *Huntington* v. *Mildmay*, *Cr. C.* 441, *Stockman* v. *Hampton*, and a more modern caſe *Carthew* 315, *Reynel* v. *Long*; which are ſeveral authorities that in pleading a deed under the ſtatute of uſes it need not be ſet out with *profert in cur'*; becauſe the deed belongs to the grantee to uſes, and he has no remedy to recover at law from them: ſo is *Noy* 145. But though this is ſo clearly eſtabliſhed, I know not but when it is conſidered, it may be called a ſpungy reaſon, as Lord *Vaughan* ſays. But there is a better; that the *Caſſinches* not claiming the land but only a rent charge, the charters belong to the owner of the land, both the ſettlement and counterpart; the owner of the rent-charge not being intitled to the deed; which is a ſubſtantial reaſon, and falls within *Carver* v. *Pinkney*, becauſe another is intitled to the poſſeſſion of the deed

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Profert not neceſſary in pleading a gift under the ſtatute of uſes. So where the plaintiff not intitled to the deed.

The plaintiff then will not be under this difficulty in pleading, and therefore is not intitled to come into this court for want of a deed, to change the juriſdiction for that cauſe. But ſtill he is intitled to a decree; which muſt be firſt a further aſſurance againſt the defendants the *Caſſinches:* next the benefit of making uſe of their names to the diſtraining or taking any remedy at law for the arrears ſince the death of the mother. But no attornment is neceſſary, becauſe it is a conveyance on the ſtatute of uſes; and if the further aſſurance ſhould be executed before any diſtreſs made, or action at law brought in the name of the *Caſſinches* for the arrears, ſo that the legal eſtate of the rent will by ſuch conveyance be out of the *Caſſinches*; the *Fauſſets* ſhall not ſet it up, or take advantage thereof.

This is a very conſiderable queſtion at law; for you may drive the defendant to very diſadvantageous iſſues by this method. The inconveniencies are ſtated clearly in *Layfield*'s caſe, 10 *Co.* 92. As to that, I give no opinion; being for the judgment of courts of law: but this is not material; if it was, I could have cited *Sowerſby* v. *Sparrow*, *B. R.* 16 *G.* 2, where upon application to the court

to diſpenſe with *profert* becauſe of the inability to give *oyer*, the court would not do it, becauſe it was the plaintiff's fault to bring his action before he had the deed, and not like the caſes where the court could help by imparlances. In *White* v. *Montgomery*, *Mich.* 17 *G.* 2, in debt on bond the plaintiff ſaid he could not make *profert*, it being in the cuſtody of a ſtranger: the court would not excuſe the want of *oyer*.

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Attorney General.

I have heard Lord *King* ſay, that if a perſon pleaded a declaration with a *profert*, and afterward was not able to produce it: upon affidavit of its being loſt, he would relieve him on motion.

LORD CHANCELLOR.

I cannot conceive what Lord *King* meant by that; for that would be a plain error on the record.

Caſe 175. Vaneſſen *verſus* South Sea Company, *February* 24, 1749-50.

One defendant not appearing; the whole line of proceſs againſt him is equal to the proceeding to outlawry at common law, and there may be a decree againſt the other defendants who appeared.

UPON a bill by a *feme covert* againſt her huſband, he not appearing, and the whole proceſs being gone through without appearance, the queſtion was, whether there could be any decree againſt the other defendants who were before the court?

That there could, was cited *Parker* v. *Blackbourn*, *Pre. Chan.* 99, which went on a ſuppoſition, that if the ſervice of the ſequeſtration had been good, the court would have gone on. So if a neceſſary party cannot be had, as if he lives beyond ſea; in which caſe the impoſſibility will be preſumed; whereas here it is ſtronger, being plainly proved; the ſequeſtration being a proof that he cannot be brought. In the caſe of *Vantyman*, *Nov.* 14, 1728, who had been divorced by a ſentence of *Dantzick*, and came to *England*, and brought a bill for ſtock, as the huſband of his wife, who was a foreigner and beyond ſea, againſt her, and againſt *Scuman* the executor of her former huſband, and *Jacobſon* who had a letter of attorney to receive the dividends, took out proceſs againſt the wife and *Scuman* who never appeared; and obtained an order *niſi*, that *Jacobſon* (who appeared and who received the dividends) ſhould

ſhould pay him 500*l.* to carry on the ſuit; againſt which order *Jacobſon* ſhewed cauſe, *The Maſter of the Rolls* ſaid; "That motions of this kind for money to carry on a ſuit were not to be encouraged, unleſs where for a ſum appearing due in all events: this motion appears to be a ſort of diſtreſs on the defendants here: can one who is a foreigner, who has a demand only againſt a foreigner, by changing his place and coming to *England*, be intitled to come againſt a foreigner? It is ſaid he may, becauſe the property is in *England*; but the plaintiff is not without remedy; for he might certainly ſue at *Dantzick* even for their porperty in *England*: and in the caſe of *Styles*, Lord *Somers*, by a decree here, affected an eſtate in *Holland*. But this court will not order money to be paid unleſs ſo much appears to be paid in all events; and here are not proper parties." There it was a decree againſt them ſubſtantially, and therefore neceſſary they ſhould be before the court; and Lord *King* agreed thereto: but the *Maſter of the Rolls* ſaid he did not know how far the court would go in a caſe of neceſſity, to prevent a failure of juſtice; which is the caſe here. The plaintiff has proceeded as far as he can; and the conſequence of bringing a new, or amended bill, would be only to charge that the huſband is beyond ſea, and cannot be brought before the court. (396)

LORD CHANCELLOR.

I will tell you what ſtrikes me: *The Company* are in nature of truſtees, ſo as to admit or deny a transfer on regular grounds: ſuppoſe it was a private truſt; undoubtedly as the courſe of this court ſtood before 5 *G.* 2, for want of appearance, though you had proſecuted to a ſequeſtration, you could not ſet down the cauſe to be heard againſt the defendant who did not appear. But *Pre. Chan.* 99 does import that you might ſo far take advantage of having proceeded againſt the defendant, that you might have a decree againſt the other parties; ſo that it would not go off for want of parties. This is in the caſe of a private truſtee. I ſhould think your inference from that caſe in *Pre. Chan.* right; becauſe agreeable to proceedings at common law: where notwithſtanding a joint cauſe of action, if one will not join, proceſs muſt be againſt his companion to ſummons and ſeverance, and then he muſt proceed alone. Suppoſe a joint cauſe of action againſt two, it is brought againſt both, one will not appear: there may be a proceſs to *outlawry* againſt him; and judgment againſt him who does appear, reciting the *outlawry*; which is conformable

to this caſe. The whole line of proceſs againſt the huſband is equal to the proceeding to *outlawry* at common law. I ſhould think it ſufficient to enable the praying a decree againſt the company; which is the import of that caſe, if the proceſs there had been regular. It is proper therefore to recite in the drawing up the decree, that you had proceeded againſt the huſband to a ſequeſtration, and then go on againſt *The Company*.

The cauſe ſtood over to conſider how to frame the decree.

Caſe 176. Aſton *verſus* Aſton, *February* 26, 1749-50.

Ante. 264. Jointreſs gives leave to the next in remainder for life, without impeachment of waſte, to cut timber on the jointure eſtate; he dying without iſſue, the remainder over in tail, having acquieſced in and encouraged the ſo doing, ſhall be reſtrained from bringing action of waſte againſt the jointreſs.

AN eſtate, including the manſion-houſe and park, was ſettled on Lady *Aſton* for her jointure, without impeachment of *waſte* except in pulling down houſes and felling timber; remainder to her ſon Sir *Thomas Aſton* for life, without impeachment of *waſte* generally: remainder to truſtees to preſerve contingent remainders; remainder to his iſſue in tail: remainder to his eldeſt ſiſter, (the now defendant) and ſo to the other ſiſters, in tail.

Sir *Thomas* the eldeſt ſon himſelf was tenant for life of the greateſt part of the eſtate, without impeachment of *waſte*: and wanting a ſum of money, the method thought on to raiſe it was by felling timber on the eſtate of which he was remainder man, without impeachment of *waſte*.

Sir *Thomas* dying without iſſue, his ſiſter becoming tenant in tail, brought an action to recover treble damages and the place waſted, and had a verdict: and for a perpetual injunction to ſtay the proceedings thereon, was the preſent bill by Lady *Aſton*.

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For Plaintiff. Though it was formerly doubted, whether the words *without impeachment of waſte* meant more than a defence againſt the action of waſte: it is now held, that it gives the property in the things cut down to the tenant for life during his poſſeſſion. The court leans againſt permiſſive waſte, and will not ſuffer one to make another anſwerable for what is done with his conſent. Suppoſe one builds on another's land with conſent; the court will not permit that land to be recovered on which the building is, looking on it as a fraud: the defendant had clear notice of the intention to do this; nor did ſhe make any complaint for

for ten years, but ſuffered her brother to receive the benefit: ſhe had notice of the general right that ſhe was to ſucceed upon his death without iſſue; but ſhe had alſo knowledge of the particular eſtate. A court of equity will preſume the conſequences of law upon knowledge of the fact; which knowledge is plain from a bill brought by her in 1725, claiming a portion in that very ſettlement.

The reading which bill, as ſhe was at that time an infant, was objected to.

LORD CHANCELLOR.

Though it cannot be read on the part of the plaintiff, to ſhew the allegations in that bill as evidence againſt the infant: yet it may be read to the ſuſequent proceedings on that bill after ſhe came of age.

For plaintiff. The defendant by her anſwer admits, that Sir *Thomas* might acquaint her that his mother had been ſo kind as to give him that leave to fell ſome timber upon her eſtate for life, which he intended to do: that ſhe ſaid ſhe was ſorry his neceſſities were ſuch as obliged him to fell it, as it would deface the beauty of the place. It was farther proved, that upon being told he had felled great part of the eſtate; ſhe anſwered he might cut down every (398) ſtick, and that her mother told her that, to ſet her at variance with her brother. The timber was felling two years after her marriage; neither ſhe nor her huſband applying to the court to ſtay the removal of it. There was a way by which the mother might have given Sir *Thomas* this liberty, *viz.* by making a leaſe for 99 years to a ſtranger, if ſhe ſo long lived, and ſurrendering her freehold to Sir *Thomas*, which would have extinguiſhed her eſtate for life in his; and then by virtue of his own eſtate, he might have cut down the timber.

For defendant. The acquieſcence is nothing; for though ſhe was tenant in tail, the action at law could not be brought during the meſne tenancy for life, until it is ſettled whoſe property it would be, it cannot be known whether *trover* would lie for it, nor could a bill in equity be brought to reſtrain what is done already: nor a bill for a ſatisfaction, that depending on the *trover*; for a bill for ſatisfaction cannot be brought where *trover* lies not. The plaintiff is not to be relieved as in the caſes of penalty: this bill muſt be founded on the defendant's being intitled in point of law:

law: the tenant for life, to be intitled to the property in the timber cut down, muſt be in poſſeſſion of that very eſtate: if it was an expreſs agreement, it might be pleaded at law to the action. The defendant had not ſufficient knowledge of his own right, whether it was a remainder in tail or for life, to do this. It is not determined whether ſuch a ſurrender as is mentioned would be good; whether one eſtate for life could be extinguiſhed in another; and that would have brought the freehold and inheritance nearer to the defendant. The preſent caſe is like that determined by your *Lordſhip* laſt year, between the ſame parties.

LORD CHANCELLOR.

This is a pretty extraordinary demand made by the defendant, to recover not only ſingle damages (this is no objection to the action) but alſo the treble value againſt the plaintiff; of which it does not appear the plaintiff received one ſhilling advantage; but it was taken for granted that Sir *Thomas*, the brother of the defendant, had the ſole benefit of ſelling this timber. It is plain from whence this controverſy has ariſen, and it is unfortunate; but that will not be the meaſure of right between the parties; for courts of law and equity muſt determine on the grounds of that right, let the motives of purſuing it be what they will. After the brother's death, it was found out in point of law, that this was waſte committed with the mother's conſent during her eſtate for life, of which no advantage could be taken during the meſne eſtate for life. The queſtion is, whether this court ſhould permit that advantage to be taken at law or relieve againſt it? And I am of opinion there ought to be relief; for there is evidence either of an expreſs conſent by the defendant to her brother's cutting down the timber, or a general tacit conſent or encouragement on her part to do it: and if that was given during the life of her brother, as circumſtances then ſtood, it would be very unreaſonable to ſuffer her or her huſband after the brother's death, and upon a change of circumſtances by the value of the timber becoming greater, to take advantage of it. Sir *Thomas* was in poſſeſſion of the greater part of the eſtate, on which he might have cut down without account; and though unmarried, being young and likely to have children, conſequently whatever information the defendant had, it was not a matter ſhe laid great weight upon. It might be a conſiderable queſtion whether, if timber was blown down or cut by a ſtranger, it would

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would belong to him in whom the eſtate was veſted in remainder, or the tenant for life. Probably I ſhould think it would belong to him in whom the eſtate was veſted: I ſhould incline to think ſo from the reaſon of the thing: though not determined by any judicial determination. * When ſhe was firſt acquainted with it, which I preſume was before her marriage, ſhe did not go to her mother, or object thereto, or tell Sir *Thomas* he had no power to do ſo. She knew ſhe had ſome right to take this eſtate; whether of inheritance or not, if he died without iſſue. The anſwer imports ſhe was ſorry he ſhould do this to his own prejudice, not her's: but it reſts not there; for the evidence imports that ſhe acquieſced with this power given her brother (and it is not material whether before or after her marriage; for though after marriage, it would be evidence againſt herſelf;) ſhe conſidering him as the head of the family, from whom ſhe might expect favours; and would not enter into a conteſt with him for ſuch a remote chance, which might induce him to hurt the other part of the eſtate of which he was in poſſeſſion. I do not rely on its being an expreſs agreement, which might be pleaded at law, if ſo; but that it was an acquieſcence and encouragement, which is ſufficient to indemnify the mother. What equity againſt the executor of her brother in *Trover* or other action is not the queſtion: but that ſhe ſhould have taken advantage of the illegality of the act at the time it was illegal. It does not clearly appear, whether ſhe knew her's to be a remainder in tail or for life: it is not very material that ſhe did not know that ſhe was tenant in tail; for if ſhe was tenant for life, ſubject to waſte, (for if without impeachment of waſte it would be very material,) there is a great difference between a remainder of an eſtate falling into poſſeſſion with timber upon it, and when ſtripped thereof; for tenant for life is intitled to the loppings, *&c.* It is determined here, that where there is tenant for life, remainder for life, remainder to the firſt and every other ſon of the laſt remainder man; if the firſt tenant for life ſubject to waſte commits waſte, the ſecond tenant for life may bring a bill in this court to ſtay waſte, which cannot be demurred to. *Dayrel* v. *Champneys*, *Eq. Ab.* 400. and I take it, the court would do this to benefit the inheritance, where the law would not admit the action of *waſte* to be brought †. In this caſe the mother might have let Sir *Thomas* have this liberty with great eaſe, although the defendant

* This was ſaid to have been alſo Lord *Cowper*'s opinion in the Earl of *Lindſey*'s caſe.

† So determined by his Lordſhip in *Parrot* v. *Parrot*.

fendant had objected to it by the method mentioned; for I take it the firſt eſtate for life might be extinguiſhed by the other: as in *Perk.* 113, *A.* title *Surrender*, which gives the reaſon for it, and is a good authority; and *Bro.* title *Surrender* 17. Then conſequently Sir *Thomas* might have done this lawfully; and no one could have called him to account for it; and the mother would have had the rents and profits of the eſtate for 99 years if ſhe ſo long lived; and the freehold's being nearer to the defendant would be no advantage; for the difference of having a naked freehold or an eſtate for 99 years in the mother, is ſo ſlight that it is of no conſequence. Then when this is the caſe, after this length of time, and the brother's death, this court ſhould not permit this advantage to be taken againſt the brother's executor. But the point I go on is, that her conduct was an encouragement to draw the mother in. There is no ſimilitude between this and the caſe I determined laſt year. I went there as far as I could, to aſſiſt the preſent defendant, the plaintiff there. The ground I went upon was, that the plaintiff there had no evidence of her own, but was forced to read the mother's anſwer, which turned out againſt the plaintiff: whereas here is plain evidence, if not of an actual agreement, of an acquieſcence leading the mother into this.

The injunction therefore already granted ought to be made perpetual. But no coſts at law or in this court; for I queſtion whether on either ſide things were fully underſtood: and I believe there were ſome miſtakes; which ought not to turn ſo much to the benefit of one ſide, and prejudice to the other.

Caſe 177. Cocking *verſus* Pratt, *March* 7, 1749-50.

Sir *John Strange*, in the abſence of LORD CHANCELLOR.

Agreement relating to diſtribution of perſonal eſtate ſet aſide, tho' ratified: the value appearing to be greater than was known at the time of agreement.

JELF dying inteſtate left a widow, and a daughter then an infant; who four months after her coming of age, enters into an agreement with her mother concerning the diſtribution of the perſonal eſtate; which agreement is afterwards ratified by the daughter's huſband; who after the death of his wife brings a bill as her adminiſtrator, to ſet aſide the agreement, and to have a diſtributive ſhare out of the father's perſonal eſtate, to the amount of what his wife was intitled to.

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The mother inſiſted on this agreement as a defence againſt going into an account of the father's perſonal eſtate. (401)

Maſter of the Rolls.

The plaintiff's bill is proper; and the right of the parties the ſame as if his wife was alive. The queſtion is what was in view on each ſide. The daughter clearly did not intend at the time of the agreement to take leſs than what by law ſhe was intitled to, her two-thirds of the value: though what that was did not clearly appear to her; but ſhe then thought what was ſtipulated for her was her full ſhare. Though there is no very great evidence of undue influence, yet the court will always look with a jealous eye upon a tranſaction between a parent and a child juſt come of age, and interpoſe if any advantage is taken. The mother plainly knew more than the daughter; and only ſays in general, ſhe believes ſhe concealed nothing from her. Whether there has been *ſuppreſſio veri* is not clear upon the evidence. But there is another foundation to interpoſe, *viz.* that it appeared afterward that the perſonal eſtate amounted to more; and the party ſuffering will be permitted to come here to avail himſelf of that want of knowledge; not indeed in the caſe of a trifle; but ſome bounds muſt be ſet to it. The daughter would be intitled to 5 or 600*l.* more; which is very material in ſuch a ſum as this, and a ground for the court to ſet it right: the daughter did not act on a compoſition, as wanting to marry, and to have ready money: but took this as her full ſhare; and if it appears not ſo, the court cannot ſuffer the agreement to ſtand. As to the ratification and releaſe by the huſband; he was as much in the dark: this eſtate therefore ſhould be divided as the law directs, and the agreement ſet aſide.

In this caſe was cited *Griffith* v. *Frapwel*, *June* 26, 1732, where one died inteſtate, leaving two ſiſters, the plaintiff's wife and the defendant's wife: the latter firſt got adminiſtration, and prevailed on the other to accept of an agreement for her ſhare. There was a further agreement, that the plaintiff's wife ſhould have a further ſhare, reciting that it was intended ſhe ſhould have an equal ſhare, and that there ſhould be a decree for that. The plaintiff afterward diſcovered the eſtate to be a great deal more, and brought a bill of review; and both the decree and agreement were ſet aſide.

Longuet

Caſe 178. Longuet *verſus* Scawen, *March* 10, 1749-50.

Grant of annuities during life of grantor in ſatisfaction and diſcharge of a debt, with power to repurchaſe and redeem the annuities; held part of the perſonal eſtate of the grantee.

SIR *Thomas Scawen* had created a term for 99 years if he ſo long lived, out of ſeveral eſtates, of which he was tenant for life; and being debtor to *Samuel Swynfen* for 6600*l.* made thirteen ſeveral grants; 12 of 50*l. per Ann.* and 1 of 60*l. per Ann.* to *S. Swynfen*, his heirs and aſſigns, for the natural life of Sir *Thomas Scawen*, to be iſſuing out of the ſeveral lands and tenements, which in a certain indenture, prepared and intended to be the ſame date, are demiſed to truſtees; which conveyance was by a ſextipartite deed of the ſame date, by two ſeveral terms, in ſatisfaction and diſcharge of the ſeveral ſums, that as long as *Samuel Swynfen* ſhould quietly hold theſe premiſſes, unmoleſted by Sir *Thomas Scawen*, upon the truſts and to the ends mentioned therein, according to the intent of it, Sir *Thomas Scawen* ſhall not be perſonally liable, nor be ſued in law or equity, nor his goods, *&c.* to be liable, to the payment of theſe annuities: provided always and agreed that it ſhall be lawful for Sir *Thomas Scawen* in ſatisfaction and diſcharge of the ſeveral ſums from time to time to repurchaſe and redeem the ſaid rents at the ſame price, upon notice given on any of the four quarterly days on which they became payable during his life.

Then there was another clauſe in the declaration of the truſt of the former term for 99 years, which was aſſigned on truſt for the better ſecuring the annuities and debts before provided for; indemnifying them againſt any meſne charges that might be brought on the eſtate; ſubject nevertheleſs to the ſame equity of redemption as above.

Samuel Swynfen having made a will, in which there was a clauſe obliging his heirs at law to ratify and confirm his will, and execute a releaſe of any claim to his real eſtate, otherwiſe to take nothing out of his real or perſonal eſtate, died: which occaſioned a controverſy, between his heirs at law, and thoſe claiming under the will, concerning theſe annuities.

For plaintiffs. Theſe annuities muſt be conſidered as perſonal eſtate, and falling into the reſidue, however limited; for if limited to heirs, *heirs* muſt be taken according to the ſubject matter, and mean *executors*. They iſſue out of a chattel, and a freehold cannot be carved out of a chattel;

chattel; for the ſtream cannot riſe higher than the ſpring head. As to the nature of the tranſaction, it is a ſecurity for money, there being a clauſe of redemption: and this was the only method, being tenant for life, in which he could do it, *viz* by granting annuities, giving greater than the legal intereſt, which may be done this way. Then by the rules of this court the money muſt be paid to (403) the repreſentative of the perſonal eſtate; which rule was not eſtabliſhed immediately; the condition being to be performed to the heir, in point of law: but it is now ſettled that it is part of the perſonal eſtate; this court conſidering it was a debt or incumbrance; and therefore though the mortgagee cannot compel a redemption, the heir at law of the mortgagor has a right to compel the executor to apply the perſonal in eaſe of the real: as in *Howel* v. *Price*, *Pre. Chan.* 423, 477, of a *Welch* mortgage; in which the rents and profits are to be received without account till the mortgagor pays the money: although courts of equity have interpoſed where the rents and profits have greatly exceeded the intereſt, becauſe ſuch are in nature of an uſurious contract. If then it is a debt on one ſide, it muſt be a credit on the other, and to be conſidered as a ſecurity for the money lent. Nor ſhould it be left in the power of a third perſon, Sir *Thomas Scawen*, to determine whether it ſhould be real or perſonal eſtate of *Swynfen*, as that might open a door to colluſion either with heir or executor. But if the court ſhould think it real eſtate; yet from the particularity of this will, the heirs at law are obliged to convey to the uſes therein; for as by the general rule of the court, there is no occaſion for the teſtator to provide that a claimant under his will ſhould not diſturb his will, he muſt have meant ſomething farther than the bare confirming the will.

For defendants. This is to be conſidered as the real property of *Swynfen* both in law and equity: the annuities are redeemable only on notice to the heirs and payment to them; by which alone can Sir *Thomas Scawen* be intitled to the repurchaſe; for it is only a purchaſe, with liberty to repurchaſe. Nothing can be redeemable but a mortgage; to which two things are neceſſary; a debt due to the mortgagee from the mortgagor, and an eſtate as a ſecurity for the repayment: and there is a clear diſtinction between a mortgage and a repurchaſe, as in the latter there is no debt due: the neareſt caſe is that of a *Welch* mortgagee, but not applicable to the preſent; there the expreſs contract being that the party ſhall have a right to redeem

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for ever; which being part of the agreement entered into, may be made uſe of; nor will a court of equity relieve againſt it. And a *Welch* mortgagee is always ſuppoſed to be put into poſſeſſion immediately.

LORD CHANCELLOR

Not always.

For defendants. In redeeming an old *Welch* mortgage the court does not look for the perſonal repreſentative to be made a party: the clauſe of redemption was inſerted for (404) benefit of Sir *Thomas Scawen* only, and not as a ſecurity; for to that it is neceſſary a debt ſhould be owing and ſubſiſting; the deed ſuppoſes the entire debt is diſcharged and gone, and then the clauſe of redemption is inconſiſtent. It muſt be conſidered therefore as a purchaſe of theſe annuities, not as a ſecurity. There can be no debt, becauſe no remedy for it; for during theſe annuities *Swynfen* or his executor cannot bring an action for it, or come here for a redemption or a fore-cloſure; and therefore Sir *Thomas Scawen* can have no power to compel a redemption; for it ought to be reciprocal. Although other perſons might put a period to the intereſt of *Swynfen* in theſe annuities, that will not make it the leſs real property; like the intermediate intereſt deſcending on an heir at law till the happening of a contingency on which an executory deviſe is to take effect: till when it ſhall have all the properties of an inheritance, of a baſe fee; which ſhall not be varied by the poſſibility of having a period: the money ought in this caſe to go to the heir at law, as in the caſes of eviction, where the ſatisfaction ſhall go to the perſon evicted. As in *M'Kenſie* v. *Robinſon*, *March* 18, 1741, where a real eſtate purchaſed was deviſed to the teſtator's brother; which proved a bad title in the teſtator: it became a conteſt between the deviſee and the perſonal repreſentative, and it was inſiſted to be the ſame as if the teſtator had never laid out his money. Your *Lordſhip* held that the money came in lieu of the other; and that the perſon who would have the eſtate, had the title been good, ſhould have the money. So in *Coventry* v. *Carew*, *July* 1742, where the teſtator deviſed a real eſtate which was to come to him in exchange for another: the exchange was refuſed; and it became a queſtion how the intereſt in the teſtator's eſtate ſhould go? Your *Lordſhip* held it ſhould go in the ſame way as the eſtate in lieu of it would have gone. It is a general rule that once a mortgage, and always

ways redeemable, and cannot be made irredeemable: whereas this is irredeemable, if Sir *Thomas Scawen* does not think fit to redeem it; by the expreſs contract and proviſo of the deed the party is to be paid the arrears of the annuity up to the day of redemption, and then to be paid the whole money, which is 10*l. per cent.* what the court will never allow: It is to be conſidered therefore as a purchaſe, ſubject only to repurchaſe; not as a mortgage or redemption.

LORD CHANCELLOR.

The general queſtion is whether theſe annuities, now made part of the eſtate of *Swynfen* of one *ſpecies* or another are to be conſidered in this court as real or perſonal? Several queſtions have been made: Firſt in reſpect of the eſtate out of which granted. Next in reſpect of the redeemable nature of the annuities. Thirdly, ſuppoſing it real, and conſequently deſcendible to the heir at law, (405) not only in point of legal eſtate, but in point of intereſt and right, whether the heir at law, within the clauſe obliging him to confirm and ratify the will, ſhould not be obliged to releaſe? which laſt queſtion I have poſtponed till the opinion is given upon the ſecond, to ſee if it be material or no: and upon that ſecond queſtion, I am of opinion that in the eye of this court theſe annuities ought to be conſidered as part of the perſonal eſtate of *Samuel Swynfen*; and if now gone to the heir at law, he is to be truſtee for the executor and the perſonal eſtate; which will depend on the nature of the agreement entered into, and of the grant or the ſecurities.

Firſt conſidering the tranſaction whence it aroſe: originally there was a debt to *Swynfen*: in what manner ſecured does not appear, nor is it material. *Swynfen* was deſirous of having a further and better ſecurity, as it is called on one ſide: on the other a ſatisfaction and diſcharge of that debt. The method taken to do this was not by granting lands or any thing abſolutely to *Swynfen*, but by dividing the debt into ſo many parts, applying them to the particular annuities granted; turning it into a purchaſe of ſo many annuities; the meaning of which was for the convenience of Sir *Thomas Scawen*, that he might redeem any one of theſe annuities on payment of the money: otherwiſe there is no ſenſe in it; for it is equally for the benefit of *Swynfen* to do it by one grant as by ſeveral. It is true that Sir *Thomas Scawen* had parted with the beneficial intereſt

tereſt by that truſt term: but a dry naked freehold in notion of law ſtill ſubſiſted in him. He by poſſibility might have outlived the term; and granting the annuities during his life was a grant out of the freehold to *Swynſen pour auter vie*, determinable by the death of Sir *Thomas Scawen*, and would iſſue in the conſideration of law partly out of the freehold: but during the exiſtence of the prior term, the profits of the annuities and of the eſtate, which the truſtees covenant to apply for that purpoſe, muſt ariſe out of the ſeveral terms for years; which, though not deciſive, is an ingredient to ſhew how they tranſacted it, and that the terms were what they relied on. I agree that being by way of grant by the owner of the naked freehold during life, it will operate out of that, after determination of the ſeveral terms; but undoubtedly the perſonal part and chattel intereſt was that out of which the annuities were to ariſe.

The court leans againſt a contract for liberty to repurchaſe where made at the ſame time as the grant, and endeavours to make it a redemption.

Then comes the great queſtion, whether they are real or perſonal? which depends on the conſideration whether they are redeemable and as ſecurities for money: and they are clearly ſo. There is indeed a diſtinction in the nature of the tranſaction, between a power of redeeming and of repurchaſing, obtained by uſage, which governs the ſenſe of words. But it is well known that the court learns extremely againſt contracts of this kind, where the liberty of repurchaſing is made at the ſame time, concomitant with the grant, as it muſt be conſidered in this caſe; being part of the ſame tranſaction; the court going very unwillingly into that diſtinction, and endeavouring if poſſible to bring them to be caſes of redemption. Although it is a different thing where the contract for liberty to repurchaſe is after a man has been ſome time in poſſeſſion of an eſtate, and acting as owner under a purchaſe: But this is clearly a power of redemption in Sir *Thomas Scawen*, from the words and frame of the deed itſelf. In the *proviſo*, which in point of law is in Sir *Thomas Scawen*, *repurchaſe* and *redeem* are uſed ſynonymouſly: afterward it is called an equity of redemption, though before it is a legal condition. As to the objection that no mortgage (which imports a ſecurity) is without a debt, and that theſe debts are declared to be paid and diſcharged: it is true thoſe words are uſed in the beginning of the deed, and afterward in the *proviſo* of redemption: but that was in reſpect of the diſcharge of the perſon of Sir *Thomas Scawen*, ſo long as the truſtees ſhould receive the profits to apply to the annuities, as appears from the

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clauſe immediately preceding the *proviſo*. As to there being no debt, becauſe no remedy: I agree there is no remedy for it by *Swynfen* or his executor; but that does not differ from the caſe of a *Welch* mortgage; which is a perpetual power of redemption, ſubſiſting for ever, and the mortgagee cannot compel a redemption or a foreclosure; in which Lord *Cowper* declared there was a debt, and as ſuch determined it ſhould be paid out of the perſonal eſtate of the mortgagor in exoneration of the real. If a perſonal thing on one ſide, it muſt be ſo on the other, and muſt be due to the mortgagee or the repreſentatives of his perſonal eſtate; for there is no poſſibility in the law of *England* to make a debt real, though in the law of *Scotland* there is ſuch a thing as an heritable debt: therefore it muſt be a perſonal debt on the other ſide: nor will it differ, that the mortgagee had not taken an actual poſſeſſion. It is true this court conſiders length of time even in theſe caſes to avoid inconveniences; but ſtill from the nature of the contract they continue redeemable during the continuance of that condition. Therefore the redemption of theſe annuities is properly compared to a caſe of that kind, of a redemption of a *Welch* mortgage. The caſes of eviction are of a different conſideration. It is true in general, that the court does not look for the perſonal repreſentative to be made party to a bill to redeem an old *Welch* mortgage: that is to excuſe the want of parties; the court leaving them to controvert the matter between themſelves. But that would not determine the queſtion, which would remain the ſame, whether not to be conſidered as perſonal eſtate: and I think in the caſe of a recent *Welch* mortgage the rule is the ſame. It is true the power ought to be reciprocal; but that is anſwered by the caſe of the *Welch* mortgage; Lord *Cowper* holding that there is no power in the repreſentative of the mortgagee to compel mortgagor to redeem or foreclose, the contract being of a different nature. Suppoſe the grantor had in the life of *Swynfen* given notice, and paid the money; undoubtedly that money would have been part of the perſonal eſtate of *Swynfen*, and gone under the direction of the will. Then whether the money was paid in his life, or to his executor or heir, that will not vary the right, which will be ſtill the ſame: and there is weight in the argument that otherwiſe it would be in the power of Sir *Thomas Scawen* the mortgagor to determine the queſtion between the executor and the heir, whether this ſhould be conſidered real or perſonal eſtate of *Swynfen*. As to the allowing 10 *per cent.* that queſtion is not material between the preſent plaintiff and defendant:

In a *Welch* mortgage there is a perpetual power of redemption in mortgagor; and mortgagee cannot compel a redemption or foreclosure.

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it may come to be material between Sir *Thomas Scawen* and the repreſentative of *Swynfen*, when he comes to redeem; but the queſtion as to theſe is, whether redeemable or not? If redeemable whether it belongs to the real or perſonal eſtate? and I think the latter, and to be accounted for as ſuch.

I will not enter into the other queſtion relating to the condition in the will; which is capable of a good deal of argument. But I may ſay on that part of the caſe, that what the heir at law contends for is contrary to the teſtator's view.

Caſe 179. Brown *verſus* Pring, *March* 12, 1749-50.

Intereſt, in contradiction to a contract not impeached for fraud, paid for ſo much as was truſt money.

SUSANNAH BROWN by deed poll depoſited in the hands of the defendant 400*l.* which, after ſome particular directions, ſhould be for the uſe and accommodation of the plaintiff her grandſon, if he ſhould not be ſufficiently provided for by his truſtees during his minority, in ſuch manner as the defendant pleaſed; with a clauſe that the defendant, his executors or adminiſtrators, ſhould not be chargeable with intereſt.

The grandſon, now at age, by his bill prayed that the defendant ſhould account for the intereſt of this 400*l.*

It was inſiſted that the repreſentatives of *Suſannah Brown* could not demand intereſt in contradiction to the contract, which was not impeached for fraud.

It appeared that 200*l.* part of this was the plaintiff's own money which had been recovered in a clauſe wherein the (408) defendant had acted as ſolicitor for *Suſannah Brown*, and in which decree there was a particular direction for placing out the eſtate, part of which this was, at intereſt for benefit of the infant, the now plaintiff.

Lord Chancellor.

I never ſaw ſuch a deed as this. It is in the nature of a teſtamentary diſpoſition; the meaning was to make the defendant a truſtee in nature of an executor: and the eſtate of the teſtatrix is put into the hands of the executor during her life, and to lie without intereſt: which indeed may be done, if perſons will, with their eyes open, and no

no fraud or impoſition: but it is an extraordinary tranſaction, and ſpeaks an extraordinary influence. As the deed is not impeached for fraud, I cannot carry it farther than to make him anſwer intereſt for 200*l.* truſt money; for which I think he ought, as he knew it to be ſuch; and though it is objected that an executrix or truſtee, as *Suſannah Brown* was with regard to this money recovered, may pay it as they pleaſe, making themſelves liable: that is true in general. But wherever I find a ſolicitor in a cauſe, in which an infant is concerned, and in which there is a direction for placing out that infant's money at intereſt for his benefit, who receives the money from the executor or truſtee; I will make that ſolicitor pay intereſt for that money, let his contract with his client be what it will. He knew that 200*l.* was part of the eſtate of the infant, which he knew (for he muſt know what the decree was) his client ought to have placed out at intereſt, and yet takes it to lie without intereſt: for that 200*l.* therefore he ſhall anſwer intereſt at 4 *per cent.*

The bill alſo prayed an open account of all the tranſactions between the plaintiff and defendant after the grandmother's death, and to ſet aſide ſeveral accounts.

LORD CHANCELLOR.

Here was a continuance of the ſame influence over the grandſon, obtained and preſerved by very wrong means. Nothing tends more to the deſtruction of young perſons, than being ſupplied with more money than what their parents, who have the proper authority, or guardians, or this court, if none are appointed, allow. If his guardians were niggardly, there ſhould have been an application to this court to increaſe his maintenance, which is very frequent. But the firſt account is ſaid to be an agreement or compoſition of a cauſe; which indeed the court favours; and will not, upon the queſtion whether either party is in the right or wrong, overhaul an agreement by parties with their eyes open and rightly informed. But here was clearly impoſition in ſtating this account: however the moſt beneficial way to all will be to let this account ſtand, with general libert, to the plaintiff to ſurcharge and falſify. But all the other pretended accounts, muſt be ſet aſide from the objections to the *Items* therein; which are ſuch as to induce the court to go farther than to ſurcharge and falſify. Here is one *Item* "for all law charges." Another, "what you pleaſe for bill of fees and diſburſements;" without any Account. (409)

bill brought in; and a groſs *Item* it is; ſuch as I would have ordered to be ſet aſide, if done with one of advanced age. *Item* "for the riſk run in money laid out:" whereas there was no riſk. Had he advanced his own, he had run great riſk, and would have deſerved to have loſt it. This is miſrepreſented to the plaintiff on his coming of age; which infects the whole; and from that time a general account muſt be directed.

Caſe 180. Wright *verſus* Wright, *March* 15, 1749-50.

Deviſe of land to two ſiſters and their heirs: if either married without conſent, ſhe ſhould have only an eſtate for life: if either died unmarried, *Robert* or his heirs ſhould take it to him and his heirs, paying 500*l.* to the other. *Robert* in life of the two ſiſters conveys all right, claim, &c. therein to his younger ſon in conſideration of love and affection and for his advancement, and dies: one ſiſter dies unmarried, the other marries with conſent; the heir at law of *Robert* can-

WRIGHT deviſed to his two daughters *Mary* and *Sarah*, and their heirs and aſſigns, lands in *Downham*; but if either of them ſhould marry without conſent of his executors, the daughter ſo marrying ſhould have only an eſtate for life therein: if either of them ſhould die unmarried, his ſon *Robert*, or his heirs, ſhould take it to him and his heirs; paying 500*l.* to the other daughter.

Robert in 1728 in the life of both his ſiſters made a conveyance that, whereas his ſiſters were intitled to the poſſeſſion and rents and profits thereof during the lives, and immediately after their death he was under the ſame will intitled to the reverſion thereof to him and his heirs, in conſideration of natural love and affection and advancement to his ſon *George*, he conveys and grants all that and all other lands, &c. whatſoever, whereof he, or any one in truſt for him, has any eſtate either in law or equity in poſſeſſion, reverſion or remainder, and which he had any right title, claim, or demand to under the will of his father in *Downham*.

Robert died in 1731, *Sarah* died unmarried in 1744. This bill was brought by the eldeſt ſon and heir at law of *Robert* to have this eſtate on payment of 500*l.* to the other daughter *Mary*, who had married with conſent.

For plaintiff. The intent upon the will was, that if either daughter died unmarried, in order to preſerve this eſtate, the proviſion before intended ſhould be turned into a pecuniary portion; to the benefit of which contingency *Robert* ſhould be intitled, if alive when it happened: if not, his heir ſhould; taking by deſcription of the perſon, not by deſcent as deriving through his anceſtor. So that *Robert* had not even a poſſibility during the life of his ſiſters. But if he had, he could not diſpoſe of it. 2 *Roll. Ab.*

Ab. 48. *A.* and *Biſhop* v. *Fountain*, 3 *Lev.* 427. The only inſtance where the aſſignment of a poſſibility in equity has been fully eſtabliſhed is only the poſſibility of terms: but even that is not allowed but for valuable conſideration: *Thomas* v. *Freeman*, 2 *Ver.* 563. But as to a poſſibility ariſing on a freehold eſtate, it is never allowed. Beſide, he was deceived in his grant, not knowing how his intereſt ſtood; ſuppoſing his ſiſters were but tenants for life. —But though a court of equity might make this good in the caſe of a purchaſe for money; yet not in the caſe of a child.

not claim this on payment of 500*l.* in contradiction to the conveyance.

For defendant. Whenever this contingency happened, it was given to *Robert* and his heirs; for *or* means *and:* which contingency deſcends; and the plaintiff can only claim it by the limitation to him and his heirs; and then *Robert* might diſpoſe of it. Springing uſes could not exiſt at law before the time of *H.* 8. the rule of law was that *choſes in action* ſhould not be aſſignable, to prevent conteſts, and preſerve the poſſeſſion of the terretenant; all which doctrine appears in *Lampet*'s caſe. But when executory deviſes and ſpringing uſes came to be ingrafted in the law, the court has leaned to ſupport the diſpoſition of contingent intereſts. (g) In *Hobſon* v. *Trevor*, the ſon of the late *Maſter of the Rolls* contracted to ſettle what ſhould deſcend to him from the father; Your *Lordſhip* decreed that he ſhould perform it: though that was not *in eſſe*; and much leſs than a contingent intereſt. So was *Beckly* v. *Newland*; which ſhews this court conſiders even mere poſſibilities on the foot of contracts, ſhould be performed, and will carry aſſignments into execution, as it will contracts. If then a court of equity will do this for a legal conſideration within the ſtatute of *Eliz.* it will for that which is a conſideration in equity only, *viz.* a natural conſideration; for no aſſiſtance is given in this court to a purchaſer that is not given to a wife or child, againſt the heir eſpecially, executor or volunteer. As in a deviſe of copyhold; the want of ſurrender whereof makes it as void a deviſe at law, as this aſſignment is void at law. So in powers defectively executed; and whether provided for or not, is immaterial here, the father being the judge of it. In *Harvey* v. *Harvey*, where Mr. *Harvey* came to have the execution of a power for the addition of her jointure; Your *Lordſhip* decreed ſhe had a right to have it ſupplied whether provided

(g) 2 Wms. 191.

vided for or not, againſt a remainder man under a ſettlement.

LORD CHANCELLOR.

This is a claim by an heir at law againſt the act of his anceſtor, done for what this court calls a valuable conſideration in the ſecond degree, by way of proviſion or advancement for a younger child. There are two queſtions. Whether *Robert* had ſuch a contingent intereſt, or right, or poſſibility, in the lands in queſtion as by any act in the conſideration of this court he could convey, aſſign or diſpoſe of? Secondly, ſuppoſing he had ſuch a contingent intereſt as a poſſibility is properly deſcribed to be, whether in fact he has conveyed it by the deed he has executed?

(411)

As to the firſt: I think he had ſuch as he could diſpoſe of under certain terms and circumſtances, though not in all events whatever. Whether this poſſibility was in him, depends on the disjunctive words in the will: and I am of opinion he muſt take as through his anceſtor, and as heir. It is a miſwriting therefore; and *or* ſhould be conſtrued *and*; which is a frequent conſtruction; as in a deviſe or grant to one *or* his heirs; to hold to him *and* his heirs: it is a fee. As to the nature of the intereſt here given; the will is very oddly worded: what might miſlead them into that recital in the deed was, that if the eſtates were turned into eſtates for life, he would have a veſted remainder. But it was ſtill an executory deviſe, not a remainder on a fee given before; and in a reaſonable compaſs of time, of the life of the daughters, will thereby go to *Robert* and his heirs: in which caſe if the firſt perſon dies before the contingency happens, his heir takes by deſcent through him, not by purchaſe. (h) But that is ſtill in notion of law a poſſibility; which though the law will not permit to be granted or deviſed; ſtill it may be releaſed, as all ſorts of contingencies may, to the owner of the land. The reaſons of the law's not allowing ſuch a diſpoſition, which this court will, are moſtly very refined: and Lord *Cowper* ſays in *Thomas* v. *Freeman*, theſe ſort of notions would not have prevailed now. But however the law muſt be taken as it is. There was a wiſe reaſon in the law's not allowing a right to ſue to be aſſigned: that it

Poſſibility aſſignable in equity for valuable conſideration; and love and affection to a child is a conſideration in the ſecond degree, and operate by way of agreement, and will be made good like the caſe

(h) 11 Mod. 127, 152. 2 Rol. Rep. 129. 4 Co. 66. 10 Co. 50. Poſſibilities of perſonal eſtates are deviſeable, as well as aſſignable, in equity. Fearne, 439, Pollexf. 44, 2 Freem. 250. 9 Mod. 101. 2 Wms. 608. 1 Wms. 572. 3 Wms. 132.

it tended to *champerty* and *maintenance* to paſs debts into the hands of the more powerful to oppreſs lower people. Yet it is now eſtabliſhed in this court, that a *choſe in action* may be aſſigned for valuable conſideration, and this may be releaſed as a *choſe in action* may: and then why may not it be put into ſuch a ſhape as to be diſpoſed of to a ſtranger, or to make him truſtee for a ſtranger? This court admits the contingent intereſt of terms for years to be aſſigned for valuable conſideration, though the law does not; and farther permits them to be diſpoſed of by will: as in *Wynd* v. *Jekly*, 1 *Will.* 572. But that depends on the ſame reaſon as a bequeſt of a *choſe in action*, *viz.* that the court will not ſuffer an executor or adminiſtrator with the will annexed, to claim in contradiction to the will; and beſide will make it good in the caſe of a conſideration: as in *Theobald* v. *Defay*, in the *Houſe of Lords* 1729, which was the ſtrongeſt caſe; being an act of a *feme covert*; and yet it was eſtabliſhed: and I ſhould not doubt in the caſe of an aſſignment of a term for years, not for money, but for a younger child, this court would make it good againſt the other children, and the executor or adminiſtrator. But this is ſaid to be a contingent intereſt or poſſibility of an inheritance, and that there is no caſe of making that good: as to which, there is no difference in the reaſon of the thing between that and the allowing of an aſſignment of a poſſibility of a perſonal thing or chattel real: the heir muſt take by deſcent and ſuggeſtion from the anceſtor. Then conſider how far the caſes have gone of *Beckley* v. *Newland* and *Trevor*'s caſe. The latter goes a great way. There was an agreement on marriage to ſettle all ſuch lands as ſhould come by deſcent or otherwiſe from his father; which this court carried into execution, notwithſtanding an expectancy of an heir at law in life of his anceſtor is leſs than a poſſibility. It is ſuch as he may bind himſelf: in law, the heir may levy a fine of lands in the life of the anceſtor, which will bind by *eſtoppel* after deſcent to him. So there is a method of conveying, that is, preventing a claim againſt it; and ſo here he may releaſe. In that caſe it was made good by way of agreement for valuable conſideration: then how does an aſſignment differ from it? An aſſignment always operates by way of agreement or contract; amounting in the conſideration of this court to this, that one agrees with another to transfer, and make good that right or intereſt; which is made good here by way of agreement. So was *Beckly* v. *Newland*, which was as little to be favoured as any caſe whatever. I agree that to ſome purpoſes, the preſent conſideration is not ſo ſtrong as

of defective execution of a power, or deviſe of copyhold without ſurrender.

(412)

that for money. If the queſtion came to be between the child ſo advanced for love, *&c.* and a creditor *bonâ fide*, the equity of the creditor will be ſuperior to that of the child: but as againſt any claiming voluntarily from the father, as executor, adminiſtrator, or heir at law, it is a conſideration, and only made ſo in the ſecond degree, where the queſtion is with a creditor who is a purchaſer. Then why does not this operate by way of agreement? Suppoſe the father had entered into a contract with his ſon, that in conſideration of natural love and affection, and the advancement he was naturally bound to make for him, he agreed for himſelf and his heirs this younger ſon ſhould have the lands when the event ſhould happen, the heir would be bound; and upon a bill brought againſt him the court would have decreed it on the foot of the equitable conſideration, and within the caſes of making good defective executions of powers, and a deviſe of copyhold without ſurrender. This is the ſame thing, though not in that ſhape; the court not laying weight on the manner, but the ſubſtance. If that was the conſideration in *Harvey* v. *Harvey*, there was a much ſtronger objection thereto; for there was not a colour of an attempt to make it good. But I agree with the plaintiff that this would not have been good by a will, and I think all theſe caſes of perſonal things differ from caſes of real eſtate; in which, if not well deviſed in point of law for want of a legal manner of executing the inſtrument or of power in the deviſor, the heir may claim in contradiction to the anceſtor, in a different manner from executor or adminiſtrator, who muſt claim according to the will.

(413) The next queſtion is, ſuppoſing this ſo whether he has in fact aſſigned or conveyed? That he intended it is no doubt; although it is aukwardly drawn: it was taken for granted that *Sarah* would die unmarried. He has taken upon him to convey every thing: though he has unluckily left out the moſt proper word *poſſibility*. It is true, he has no immediate claim or demand; but the word *claim* may deſcribe it *in præſenti* or *futuro*; and there is a covenant for further aſſurance. This therefore is well deſcribed; and it is incumbent on this court to make the moſt liberal conſtruction for its taking effect, becauſe it is in the caſe of a younger child.

The plaintiff therefore has no right to this redemption for 500*l.* as he claims by his bill: but it muſt be diſmiſſed with coſts.

Attorney

Attorney-General *verſus* Scott, *February* 23, 1749-50. Caſe 181.

TWO bills were brought relating to the election of a miniſter for the pariſh of *Leeds*. Preſentation to a living.

By a decree of Lord *Chancellor Bacon*, twenty-five of the principal inhabitants of the pariſh were to preſent and elect a proper perſon; being thereby appointed truſtees to meet for that purpoſe within four months after the death of the incumbent; with directions to keep the truſt filled up: and this preſentation by them or the major part of them was to be approved of by certain aſſiſtant preachers.

The laſt incumbent died in *February* 1745, but it happened that by the death of Sir *William Milner*, one of the truſtees, a ſhort time before, there was then an equal number of truſtees, who, upon notice given in the church to conſider the method of proceeding, met 22 *March* 1745. The candidates propoſed were Mr. *Scott* and Mr. *Kirkſhaw*. They were equally divided, twelve againſt twelve, ſo that then there was no election. Thus it reſted till the latter end of *July* 1746; when one of the truſtees who voted for *Kirkſhaw* died: upon notice of which *Auguſt* 6th, the friends of *Scott* determined to meet on the 7th; at which meeting ſeven of them were preſent in perſon; and five more by proxy, and ſigned the preſentation of *Scott*; which they ſent to the other truſtees, who did not think fit to ſign it.

The firſt bill was by *Scott*, as principally concerned, and the truſtees voting for him; the end of which was ſingly to eſtabliſh his election, and to compel the other truſtees, who differed, to join in the preſentation of *Scott*, to make an effectual legal preſentation to the Archbiſhop ordinary of the dioceſe, to compel an induction.

The ſecond was an information at the relation of *Kirkſhaw*, and ſeveral other inhabitants of the pariſh, to eſtabliſh an election ſet up for him in the inhabitants of this pariſh at large, and for a regulation of the charity. (414)

LORD

LORD CHANCELLOR.

The firſt bill muſt be firſt determined; for if *Scott* had gained a right under his election, it puts the other out of the caſe.

This is one of thoſe caſes, which proves the wiſdom of the general eccleſiaſtical conſtitution of this country in veſting the right of collation to a living in general in the biſhops of the ſeveral dioceſes, or in the patron of the particular church; which is ſuppoſed to ariſe from endowment; which may be by accident. And it appears that when people to amend in particular caſes go out of that general rule, it is commonly attended with inconveniencies. In ſpeculation, the election of miniſters by the people ſounds well, but it is not to be ſo conſidered as in *Republicâ Platonis*; and it is plain that ſome inconveniencies ariſe, either with bad effects in the manner or circumſtances of that election, or with law ſuits, as in this caſe, by going out of the general rule, to create a particular benefit to the pariſh.

Truſtees having right to elect and preſent; all not joining the preſentation, not valid in point of law.

As to the election of *Scott*, that depends upon what was done at the two meetings: and on the beſt conſideration I can give, I ſee no ground in law or equity to ſupport his election. It may be unfortunate for this pariſh, when either of theſe, to whoſe character there is no objection, might have made a very proper miniſter. But the court muſt conſider the queſtion of right. It is admitted on all ſides, that in point of law the preſentation of *Scott* has been invalid; and the law is certainly ſo; and therefore a *quare impedit* brought on that foundation could not be maintained; all the truſtees being in point of law jointenants of this advowſon: and then the ordinary is not compellable to accept the preſentation; for he may refuſe or accept it. This bill therefore is brought to ſupply the defect of that preſentation in a court of equity, inſiſting that there is ſufficient ground for that, and to compel the other truſtees to join in the preſentation. If the election is not good in point of law, it is incumbent on a court of equity to ſee that every thing was rightly tranſacted in that election. There may be a caſe in which an election might be in ſtrictneſs of law regular, and yet ſuch circumſtances might be in it, as would not induce a court of equity to compel the other truſtees to join in it; for whoever comes into a court of equity to ſupply legal defects, muſt come on equi-

table

table grounds, and ſhew every thing to be fair, which I do not ſee here. This brings it to the queſtion whether here has been a ſufficient valid election of *Scott?* What I ground myſelf upon is, that the decree requires not only a preſentation, but election; which puts an end to what was inſiſted upon, that this being but a preſentation, if any one or two of the truſtees had met and ſigned an inſtrument or repreſentation, they might have ſent it about to the houſes of the others: But the decree requires a previous election; in order to which there muſt be a meeting and aſſembly. It happened fortunately for the pariſh, that at the death of the laſt incumbent the number of truſtees, which it was intended ſhould be odd, was then equal: the duty of electors at meeting was to ſee and hear the propoſal of any candidate that ſhould offer; and to judge of their merits, and offer reaſons as to their fitneſs. I conſider what was done ſubſequent to the death of the truſtee who voted for *Kirkſhaw*, and the meeting on ſeventh of *Auguſt*, really and in fact as carrying on the former election; and ſeveral objections have been made to this meeting and this act. (415)

As to the firſt objection, that the meeting was held after the four months: that I am of opinion is not ſufficient; for though it is true there is ſuch a direction in the decree, yet that is only directory; and if all the ſurviving truſtees had met after the four months on a proper ſummons, it would be very good; and proper to be compared to the caſe of the *Borough* of *Landſdown* in *Roll. Abr.* which has been ſince held to be law, where the election was to be by a ſelect number within eight days, and they did not meet till long after: it was held only directory, and that by their conſtitution they had a general power of electing. So here, the truſtees having the advowſon in them, it was incident to that legal eſtate veſted in them, it was not intended to take away that right; and the ground was in that caſe, that the words were affirmative and not negative.

Truſtees having an advowſon, with direction to preſent in ſuch a time, that is only directory; and they may do it afterwards. General diſuſage is an evidence of conſent to lay aſide a part of their conſtitution that aroſe by conſent.

The next objection is, that there was no approbation of aſſiſtant preachers, as required by the decree: but I am of opinion that is not an objection to this election. It is true, that it is a direction by conſent in that decree: But it has not been obſerved for a long time; and plain that from the *Reſtoration* to this day there has been no regard to it. This was a truſt, a right, a patronage, veſted in them for benefit of the pariſh; not ſo as to create a devolution to the pariſhioners in general; for the ſenſe of the decree was to avoid that. As this direction was for the benefit of the pariſh,

pariſh, and aroſe by conſent, it may be laid aſide by common conſent: and the general diſuſage is an evidence of ſuch conſent to lay aſide that part of the conſtitution as uſeleſs. It is to be compared therefore to the caſe of a preſumed by-law. Where in a corporation the election is veſted in the corporation in general, on particular circumſtances annexed, and afterward that election veſted in a ſelect number, and thoſe particular circumſtances diſcontinued; the courts of law will preſume an ancient by-law to vary the conſtitution; the law allowing a preſumed by-law in writing, which does not appear, in order to ſupport it. So here will I preſume a common conſent of the truſtees and pariſhioners to lay aſide that cuſtom, and will not throw that imputation upon all the elections made in this pariſh ſince that time, and on the ſeveral Archbiſhops who have inducted ſince, as being invalid and contrary to that truſt; for that I muſt ſay, if I ſay this election is void for want of theſe aſſiſtants. And indeed very unneceſſary was it to have them: nor does it appear to have ariſen from the opinion of Lord *Bacon*, but by common conſent; and may be laid aſide by conſent, of which this long uſage is evidence.

(416)

A by-law may be preſumed.

The next objection is from the nature of the thing, that what was done then was no election; and it does not appear that it was; the evidence reſulting only to be a meeting agreed to be had by theſe twelve, including their proxies, to confirm thoſe votes given before, not to conſider of new candidates, and to go to a fair regular election, but by taking advantage of the death of that truſtee. And it has not the nature, quality or appearance of an election.

Notice of the meeting to an election, where neceſſary.

But ſuppoſing it had; the next objection is, that there was not ſufficient notice of this meeting; to which two anſwers are given: that none was neceſſary; and next that if it was, there was ſufficient. I am clearly of opinion, that in order to an election under this conſtitution and truſt, notice of the meeting for election was neceſſary: from the nature of an election, which muſt be free, and at which all perſons who have a right to appear ought to have an opportunity to be preſent, to effectuate the ends of it. It is ſo in all elections in corporate bodies, whether to be made by the corporation at large, or by ſelect numbers: unleſs where an election is to be at a charter day, fixing a particular day; for there every member is bound to take notice of that day. But if no charter-day notice muſt be given; and that, whether the perſons who are

to

to meet and act are all on a par, and of equal authority; or whether there is a preſiding perſon or not. It muſt be given, either a ſpecial notice or a general, eſtabliſhed by uſage; it is not material which; for if it is ſuch an act as amounts to notice, it is ſufficient. It cannot be ſaid the major part of theſe twenty-four could have met where they pleaſe, and gone to an election, and bound the reſt: the major part may meet indeed, and bind the whole; but not without notice, at any time or place; for the conſequence then might be, that thirteen might meet, and ſeven of thoſe thirteen would bind the whole twenty-four. But it is ſaid, that by this decree, there is no direction concerning notice; no perſon whoſe particular duty is to give it; (417) which is true: and for that a caſe in *Carter* is cited. But it is not to be compared to the caſe of a condition, which ſtands on a different foundation; for wherever there is a condition in a will or ſettlement, it is a quality of the right, of which the perſon taking under it is bound to take notice. It is true that a caſe may be put in which they may differ; and ſome be for meeting at one time and place, and others at another. I think thoſe truſtees who firſt give notice ſhould take place; and it is hard to ſuppoſe their notice ſhould be given at the ſame inſtant. It is properly compared to an arbitration: ſuppoſe a reference to five arbitrators; the major part of whom are to meet and determine; they may meet and bind the reſt. But that muſt be upon the others having an opportunity to meet. Yet in that caſe all theſe objections ariſe; none having more authority to give notice than the others: the firſt notice ſhould take place. But the law requires it ſhould be given; and ſeveral caſes have been before this court, where ſuch an election of miniſters, or for any other purpoſe, being veſted in a number of truſtees, it is always required. Next the evidence inſiſted on of a ſufficient notice taken in its fartheſt extent, is not ſufficient: the law preſumes perſons meet to elect the act reaſonably; and that the reaſons and arguments offered by one would influence the others: therefore the not giving an opportunity to one to meet, avoids the election, as has been frequently determined. Other candidates might be propoſed; which ought to have been taken into conſideration; and the majority of the whole number might have agreed therein; for I am not to preſume they all intended to adhere to their former opinion.

Another

Truſtees cannot make a *proxy* to vote in a perſonal truſt requiring judgment.

Another objection, which deſerves conſideration, as I may be obliged to give ſome directions about it, is as to the proxies: firſt that by law no proxy ought to be admitted to vote. Next, that if they ought, there was not a ſufficient number to give *Scott* a majority, by making up the number twelve; for that one of the proxies vote was void, as the perſon who gave him a letter of attorney appeared himſelf. There is no evidence that proxies were admitted before in this election: but the truſtees agreed among themſelves to vote by proxy; and if it reſted on that, and they had met regularly, they might, I doubt not, have made proxies to ſign the preſentation; for it is true that a truſtee who has a legal eſtate veſted in him, may make an attorney to do legal acts: and I ſhould have been unwilling to avoid the election upon that head, if it had been in purſuance of that agreement; but it was not ſo. Here is a perſonal truſt; the decree has directed the election ſhould be by the truſtees or the major part: if then the truſt muſt be executed by the major part, which requires judgment, there is no inſtance where a truſtee is allowed to make a proxy to vote in a perſonal truſt of this kind: the truſtees were themſelves to judge of the qualifications of the candidates, and could not delegate that judgment to others, but
(418) ought to exerciſe it themſelves. Then as to the next, I doubt whether that proxy did ſubſiſt to give a vote, and ſhould have thought it was determined by the party's meeting, but it is not neceſſary to give an opinion about that. I think theſe proxies, ſo far from being the better for the name of the particular perſon for whom they are to vote being given, they are the worſe for it; the truſtee, who does ſo, determining himſelf without hearing his brother truſtees. On theſe reaſons the election of *Scott* is not to be ſupported: conſequently that bill muſt be diſmiſſed abſolutely.

An information not to be diſmiſſed, though the relief prayed is wrong, if any directions neceſſary. Ante, Attorney General *v.* Parker.

As to the information, that is not to be diſmiſſed, whether what is prayed is properly prayed or not; for though the particular relief prayed is wrong, the information by the *Attorney General* is not to be diſmiſſed, if that charity wants any direction. Then it prays the eſtabliſhing the popular election of *Kirkſhaw*; which I cannot do, being contrary to the ſenſe of Lord *Bacon*'s decree; which is, that for the more orderly and peaceable election, it ſhould be in this manner, the cure being great, and the pariſh large; pointing out the reaſon of veſting the election in a particular number, and directing that the truſt ſhould be kept filled up; this inſtitution being merely to avoid a preſentation

ſentation at large. Then a court of equity will not ſay that *ceſtui que truſt* ſhall preſent, contrary to this truſt; nor unleſs compelled to it by a plain abſolute right, eſtabliſh a popular election of a miniſter in this large pariſh; which is the worſt way of nominating; and what all courts ſhould avoid if poſſible: there is no ground, at leaſt in a court of equity, to ſay there is a devolution upon the pariſh at large. My opinion then is to do what the truſtees ſhould have done; to direct the number of truſtees to be filled up properly, and then to go to election: agreeable to the caſe of the *Attorney General* at *the relation of Kinver pariſh* in *Staffordſhire* v. *Foley*, in the *Houſe of Lords*, in which I was of counſel. *Foley* had from the heir of the ſurviving truſtee got a conveyance to himſelf of the term: the queſtion was whether the advowſon of the pariſh was not in truſt for the pariſhioners? and it was ſo held by Sir *Joſeph Jekyl*, and by Lord *Macclesfield* on a rehearing; the court taking it that by the extinction of the truſt there was a devolution to the pariſh, and directed an election to the pariſhioners; which was had, as popular elections are, with great confuſion. There was after that election an appeal to the *Lords*, *December* 1, 1721; who reverſed both decrees, and were of opinion, that though it was originally a truſt for the pariſh, an abſolute power was veſted in the truſtees of nominating ſuch a miniſter as they or the major part ſhould think fit, in order to avoid the inconveniencies of a popular election; and would not ſuffer upon the notion of a reſulting truſt that thoſe inconveniencies ſhould ariſe again; declaring that the ſurrender to *Foley* was a breach of truſt; and therefore, the old term being merged in the inheritance, a new term ſhould be created, and veſted in thirteen new truſtees to be approved of by the court, who ſhould go to the election of a miniſter. This was to avoid the inconveniencies this pariſh is now running into: it was admitted throughout that it was a purchaſe by the pariſh by contribution, as it is in this; and though all the truſtees were extinct, yet to preſerve the intent the *Lords* gave that direction. That was a very ſtrong caſe, and a very reaſonable and right one; and the reaſon of it falls in with this, though this is rather ſtronger, as the decree provides for the continuance of the truſtees; which was not ſo there. The election of *Kirkſhaw* therefore alſo is void, and the information, ſo far as it prays that, ought alſo to be diſmiſſed.

Where the right to affect a miniſter ſhould not devolve on the pariſh at large.

As to the remaining regulations: firſt as to the aſſiſtant preachers, I ſee no reaſon for them; next as to a direction

for

for a ſubſequent election, I will direct two meetings of the truſtees; the firſt to fill up the whole number to twenty-five, and to appoint a ſubſequent meeting, and give notice thereof in writing to all the truſtees. If I make an order that the miniſter ſhould read ſuch notice after prayers, I cannot compel him to do it: hereafter therefore, for the more regular election, the truſtee named firſt in ſuch deed of truſt ſhall, within 14 days after avoidance, ſend ſuch notice to every one of the reſt.

In the argument for *Kirkſhaw* was cited *Attorney General* v. *Davy*, *January* 24, 1740, where three perſons being to chuſe a chaplain for *Sanford* near *Crediton*, the queſtion was whether two could nominate without all concurring? and that his *Lordſhip* held in general the three ſhould concur. But the uſage might be different: that though it ſhould come out, that the choice by two might be good on the foot of the uſage; yet the third having a right to be preſent muſt have notice, which he did not appear to have had.

In the preſent caſe there was an appeal to the *Houſe of Lords* from this decree, which was affirmed by conſent. And *February* 18, 1750, it was moved to make the judgment of the *Lords* a ſtanding order of this court.

Lord Chancellor ſaid, it was neceſſary to do ſo, where the *Lords* vary or reverſe a decree of this court, becauſe it is to be carried into execution here: but he never knew it ſo drawn up, when the decree was affirmed by conſent: (420) and deſired the *Regiſter* to ſee if he could find a precedent of that kind, and if ſo, to draw it up in that manner.

Caſe 182. Avelyn *verſus* Ward, *March* 19, 1749-50.

Deviſee on condition of giving a releaſe in three months after teſtator's death, if not, to go over, dies

SERGEANT URLING deviſed his real eſtate to his brother *Goddard Urling* and his heirs, on this expreſs condition, that within three months after his deceaſe, he ſhould execute and deliver to his truſtee, a general releaſe in full words, of all demands which he might claim on his eſtate or any part, for what cauſe ſoever. But if his brother ſhould neglect to give ſuch releaſe, the ſaid deviſe to him ſhould be null and void to all intents, and in ſuch

ther

caſe he deviſed it to *Richard Ward* and his heirs and aſſigns for ever.

in life of teſtator: the land ſhall not deſcend to heir at law, but go to deviſee over; it not being a ſtrict condition, but a conditional limitation. (i)

He gave ſome bequeſts to his ſiſter: and in the end of the will there was a clauſe, that what was given to *Goddard Urling* and his ſiſter ſhould be taken in full ſatisfaction of the claims and demands which they or either of them could make on any part of his real or perſonal eſtate; and upon this expreſs condition, that the ſiſter and her huſband and the brother, within three months after his deceaſe, executed a general releaſe of all manner of actions, cauſes of action, debts, claims, challenges and demands whatſoever, in law or in equity, againſt his truſtee or his repreſentatives, of, in, to, and out of his eſtate, real and perſonal.

Goddard Urling the firſt deviſee upon this condition, who happened to be heir at law, died in life of the teſtator.

For defendant Richard Ward. The teſtator by expreſs words intended nothing ſhould deſcend to the heir at law; and the eſtate never veſting in *Goddard*, the queſtion is, whether the limitation over can take effect? Which will depend on the diſtinction, if it is on a precedent limitation, which by what means ſoever being ſet out of the way, the limitation over may take effect: or upon a preceding condition or contingency; for then it cannot, unleſs that condition firſt happens or exiſt; as in deviſe of an eſtate if *A.* goes to *Rome*. That it meant the former, appears from the nature of the deviſe, as well as from general obſervations of the will: and in that caſe, if the precedent eſtate determines any other way, the limitation over always takes effect; as in a limitation for life, remainder in tail to the firſt and every other ſon, remainder over: though the firſt ſon never came *in eſſe*, the remainder takes effect. Suppoſe a gift to one for life, and after his death remainder over, if forfeiture, *&c.* determines it, it goes over: A gift to a Monk, and after his death over: it goes over immediately. So that it is immaterial whether determined on the event in view of the grantor, by death, or being void *ab initio:* nor is the order of the words of giving a precedent or ſubſequent limitation conſidered. In *Jones* v. *Weſtcomb*, Lord *Harcourt* held the deviſe over good, though

(i) 3 Lev. 125. 2 Str. 1092. Fearne 400. Douglas 63. 1 Wils. 107. 3 Burr. 1624. Talb. 44. 3 Atk. 315.

though the firſt contingency never took effect. * The ſame will came in queſtion again in *Andrews* v. *Fulham*, upon the term, *June* 20, 1738, in *B. R.* when *Lee* C. J. delivered the opinion of the whole court, "that the limi-"tation over to the ſiſter was good, and that the deviſe to "the infant being ineffectual was out of the caſe, and the "law the ſame, whether the deviſe immediately preceding "the limitation over was originally void, or became ſo by "non-exiſtence or non-entity of the perſon; for that "ſince the law allows ſuch a limitation over, it allows the "waiting for it: that it was an executory limitation, "which are all on ſome contingency on the failure of a "preceding limitation, and none of them takes in all the "ways of failing, yet it was the ſame thing. Nor was it "neceſſary the deviſe to the ſiſter ſhould take effect imme-"diately, and that the caſe of *Glaſcock* v. *Warren* in *Com-"berbatch* was diſtinguiſhable from that caſe." But in *Fonnereau* v. *Fonnereau* Your *Lordſhip* ſaid the record of that caſe could not be found; and therefore it is of ſuſpicious authority. This being the determination upon the leaſehold part of the eſtate, an ejectment was brought in *C. B.* on the real eſtate between *Roe* v. *Wicket*, where the opinion of *Willes* C. J. and the reſt of the court, except *Forteſcue* J. (who differed, but did not hear the argument) was, "That it might be either a limitation or a condition; "but the queſtion was, whether when an eſtate is deviſed "on three contingencies, the deviſee ſhall have it though "none of them had happened; and this in diſheriſon of "an heir at law; another contingency having happened, "that no child was born; as to which there was no direc-"tion in the will, which was *caſus omiſſus*; and the rule "was, that an heir is not to be diſinherited but by expreſs "words or neceſſary implication: ſo that upon this ground "the deviſe could not take effect; that it was given over "on a contingency not happening: and that *Andrews* v. "*Fulham*, being a determination upon the leaſehold, was "diſtinguiſhable: the plaintiff there had aſſented to the "deviſe over, and therefore was concluded: and that "there was a difference of conſtruction between the leaſe-"hold and freehold, becauſe of the favour ſhewn to an "heir at law." The parties not being ſatisfied with this determination upon the freehold, by which it was diſtin-guiſhed out of the two former caſes, another ejectment was brought between *Gulliver* v. *Wicket* in *B. R. Mich.* 19 *G.* 2.

* Lord *Chancellor* ſaid, that though the child's dying without iſſue is not mentioned in any of the printed books, the caſe was ſo.

G. 2. when *Lee* C. J. gave the opinion of the whole court, "That the ſubſequent deviſe was to be conſidered as a li-"mitation ſubſequent; the firſt as a preceding limitation "(not a condition or contingency) which whatever way it (422) "was laid out of the caſe, the other took effect." A queſtion like this came before Your *Lordſhip* in *Fonnereau* v. *Fonnereau*; where the teſtator limited over in caſe of iſſue all dying, without putting the caſe of there being no iſſue at all: and though there was no iſſue, it was held the ſubſequent limitation ſhould take effect. In Lord *Townſend* v. *Aſhe*, *May* 14, 1745, two ſhares in the *New River Company* were ſettled on *Aſhe* for 99 years if he ſo long lived, remainder to the children, remainder to *A. B.* and *C.* as *Aſhe* ſhould appoint, remainder over to uſes under which the plaintiff claimed. Theſe ſhares are real eſtate, and fines are levied of them: and though no appointment had been, the limitation over was held good.

For the heir at law it was inſiſted, that this was a ſtrict condition; out of which *Richard Ward*'s intereſt is to ariſe: and before any breach could happen, the eſtate muſt firſt veſt in *Goddard Urling*, which would have been the whole fee: and therefore not like the caſes where ſomething particular is given before, as in a deviſe to a monk, or to *A.* for life; in which it depended on the antecedent eſtate; and whenever that determined, it lets in the remaining intereſt, which aroſe out of the original deviſe.

LORD CHANCELLOR.

On this will the court is bound to make ſuch a conſtruction as to make good the plain intention of the teſtator, provided there are words in the will for it, or it can be done conſiſtent with the rules of the court.

The queſtion will very much turn on this; whether this deviſe over is to be conſidered, and the contingency on which it is given, as a ſtrict condition or a conditional limitation; (k) for if the former, it would be very difficult to maintain that the ſecond deviſee could have the eſtate but upon a ſtrict breach or non-performance? If the condition had been performed, or it became impoſſible by act of *God*, that cannot be: but if it be a conditional limita-

(i) 2 Brown, 67. Ibid. 73, Sir Lloyd Kenyon ſaid, there were many caſes rendered impoſſible to be done, and yet the eſtate ſhall not veſt.

tion, the conſideration is different ; * and I know no caſe of a remainder or conditional limitation over of a real eſtate, whether by way of particular eſtate ſo as to leave a proper remainder, or to defeat an abſolute fee before by a conditional limitation ; but if the precedent limitation, by what means ſoever, is out of the caſe, the ſubſequent limitation takes place : and I am of opinion, this muſt be ſo conſtrued. If it is a condition ſtrictly, it is ſubſequent; becauſe the eſtate would veſt in *Goddard Urling*, and to be defeated by what might happen afterward. But that is not the conſtruction in this caſe, and never is ; for if there is a deviſe to a ſtranger, not the heir at law, upon a condition ſubſequent ; the deviſee over cannot
(423) take advantage of the breach ; for the benefit thereof is not deviſeable, but muſt go in privity to the heir at law of the grantor, who muſt enter for the breach, not the deviſee : though in ſome caſes perhaps a court of equity might make the heir a truſtee for the deviſee. Therefore where an eſtate is deviſed paying a ſum of money ; and if not paid, over to another : it is a conditional limitation to effectuate the deviſe, not a condition, according to *Co. Lit.* But this is ſtronger, becauſe the deviſe is to the heir at law ; who being the only perſon to take the advantage, and if he ſurvives the teſtator, muſt be ſuppoſed to be in poſſeſſion by the deviſe, muſt enter on himſelf : then how could this condition be made effectual according to law ? It will be conſtrued therefore a conditional limitation : and it ought to take effect, notwithſtanding the words *that if he gave not ſuch releaſe it ſhould be null*, &c. If it is to be conſtrued as a ſtrict condition, what is inſiſted on for the plaintiff, that there muſt be a ſtrict breach or forfeiture in fact agreeable to the words to make the ſubſequent eſtate take effect, would be the rule. But as it is a conditional limitation, it comes to the queſtion whether it is neceſſary every particular fact ſhould take place ; or whether it is not to be conſtrued according to the ſenſe and intention of the teſtator, that if in any event the firſt cannot take place, the ſubſequent ſhould ; if ſo, the ſubſtance of this was, the intent of the teſtator that if no ſuch releaſe was executed, whereby the demand againſt his eſtate would exiſt, the eſtate ſhould go over. And I think the determi-
nation

* Douglas, 487. Note. In 2 Pr. Wms. 390, it was held that as the contingency (which is annexed to all the deviſes over) did not happen, the ſubſequent limitations could not take effect ; and the ſame doctrine was held in Douglas 74, but Lord Mansfield there held if a *plain intent* appeared the court would ſupply any defect ; and in Cowper 40, though the contingency did not happen, yet the limitation over took effect, as it plainly appeared to be the teſtator's intention. Fearne, 405.

nation of Lord *Harcourt*, and of the court of *B. R.* in the firſt caſe upon the term, that it was a good limitation though no child born, conſidering it the ſame as if the teſtator had ſaid that if no iſſue ſhould be of ſuch child; is in point: but more ſtrongly the determination of *B. R.* in the laſt caſe upon the freehold. The caſes put of a remainder on a particular eſtate are admitted: but it is ſaid they differ from a conditional limitation, to introduce an executory or ſpringing deviſe after a fee. I do not find any authority to warrant that diſtinction; for *Jones* v. *Weſtcomb*, is a ſtrong authority, that the conſtruction ought to be the ſame, whether it is on a remainder ſo limited on an eſtate which never takes effect, or whether it is a contingent limitation after a fee; for in that caſe it was ſo in reſpect of the freehold, notwithſtanding the deviſe for life which was precedent to the limitation in fee to the child and his heirs, after which comes the limitation to the ſubſequent deviſees. As that fee to the child ſtood before the limitation over to the perſons claiming, the precedent eſtate for life did not alter the caſe; becauſe there was a complete diſpoſition of the fee before the deviſe over, if the child had been born. Therefore, with all deference to the contrary opinion of the court of *C. B. Jones* v. *Weſtcomb* is in point; concurring with the reſolution in *B. R.* eſpecially the laſt, which has there the advantage, againſt that ſingle reſolution in *C. B.* and agreeing with the opinion given by me in (l) *Fonnereau* v. *Fonnereau*. But this caſe is ſtronger, from the clauſe expreſsly excluding the ſiſter, now heir at law, in all events from taking any other benefit than what was given by the will; which is an injunction upon her to releaſe every other claim, action, *&c.* and this is to be recovered by action. (424)

The teſtator having alſo bequeathed ſome legacies of *South Sea ſtock*, it was inſiſted they were not ſpecific, but general legacies; conſiſting only in quantity, and muſt on a want of aſſets abate in proportion with pecuniary. He uſed no words applying it to the ſtock he then had; and if he had none at the time of making the will, the executors muſt have bought it. In *Pierce* v. *Snaveling*, *R. Roland* deviſed two legacies of 5000*l.* in old *South Sea annuities*, and the reſidue to his nephew *Snaveling*; making *Pierce*, one of the legatees, ſole executor: the teſtator at the time of making the will and at his death had but 500 *l.* the reſiduary legatee inſiſted he was not bound to make Poſt. 29 July, 1754.

(l) 2 Atk. 31.

good the deficiency, but that the ſtock of which the teſtator died poſſeſſed ſhould be equally divided: the difficulty was whether it was a ſpecific legacy; for then this 5000*l.* ſtock alone could be applied, and none could be bought. Sir *Joſeph Jekyl* held that the 5000*l.* ſhould be equally divided between the two legatees, becauſe it was a ſpecific legacy, and nothing more could be added to it, and becauſe one would be defeated entirely. As in a deviſe to *A.* and his heirs, and in another part of the will the ſame eſtate to *B.* and his heirs, the better opinion is they ſhould be jointenants. When it came before Your *Lordſhip* you held it not a ſpecific deviſe, but that each ſhould have 5000*l.* ſtock out of his eſtate; he not giving his *South Sea* ſtock he had at that time, but ſo much; there being a great difference in the *civil* law, where a thing is given by the name of *ſuus:* but the principal diſtinction was between a ſpecific legacy, which is a gift of the thing the teſtator has, and a legacy of a *ſpecies* of things; which is the giving only ſo much of the ſort of goods the teſtator has, and can be made good out of his eſtate by purchaſe; the other cannot. Therefore you directed 5000*l.* ſtock ſhould be bought, to enable the executor to make good both legacies: this is in point; the only difference being, in that caſe there was this natural objection, if to be conſidered as a ſpecific legacy, *viz.* the abſurdity in the teſtator's giving the thing he had not. But that was not the only, nor the principal argument. Suppoſing the teſtator had ſold any part, the executor muſt have purchaſed to made it up: and the teſtator might have had this in view, not to tie himſelf down from ſelling this ſtock; on the other ſide not to let the legatee ſuffer by having it liable; for if it was a ſpecific legacy, the teſtator's ſelling out would have been an ademption. (m) *Aſhton v. Aſhton*, *November* 24, 1735, was cited in that caſe againſt the opi-
(425) nion Your *Lordſhip* was of; Lord *Talbot* holding it a ſpecific legacy, not in quantity only: but there appeared plainly the intent of the teſtator was ſo, from the words in the truſt, *to ſell as ſoon as may be.*

LORD CHANCELLOR.

Legacies of ſtock are ſpecific or general le-

In this caſe, notwithſtanding (n) *Pierce* v. *Snaveling*, theſe are ſpecific legacies. It is true I determined there contrary

(m) 3 Wms. 386. (n) 2 Vol. 562, 623. Cas. temp. Talb. 152. 1 Atk. 414, 508. In 2 Brown 113, Lord Thurlow ſaid, many caſes are determined contrary to this, and are by Lord Hardwicke himſelf, *viz.* Purſe and Snapling. But Lord Hardwicke ſeems to have well conſidered the circumſtances, and did not mean to lay down an invariable rule.

trary to *the Maſter of the Rolls*, that they were to be conſidered as general legacies, conſiſting in quantity only, and not to be referred to the ſtock the teſtator was poſſeſſed of; it appearing he knew all the circumſtances of his eſtate, and could not make a miſtake in computation, nor intend to give 10,000*l.* out of 5000*l.* but plainly intending to give each legatee 5000*l.* and therefore it ſhould be made up out of the perſonal eſtate. * But I did not thereby determine that every legacy of ſtock or annuities muſt be conſidered not as ſpecific, but general and conſiſting in quantity only. It is ſaid the teſtator had not ſaid in that caſe he gave ſo much of *his South Sea* annuities: which was a reaſon relied on in that determination, inſiſted upon at the bar, and taken notice of by me: I will repeat what I then ſaid by way of caution. It was obſerved that the teſtator had not deſcribed the annuities by the word *my*, and did not intend to confine it: and though this obſervation was treated with little weight, and in many caſes it is too ſlight to have weight, and I cited an authority in the civil law, which lays perhaps too much on the inſerting *my* or *ſuus*, I went not upon that deſcription or words being neceſſary: but that if it appeared by any hint that the teſtator intended to give out of that, it would confine it: where nothing of that ſort appeared, it was to be conſidered as a general legacy. And I endeavoured to avoid making uſe of that which is now endeavoured to be made uſe of; and by way of caution added, "I do not intend, "nor lay it down as an invariable rule, that in all caſes "of deviſes of ſtock they are to be conſidered as general "legacies: but always according to the will and the circumſtances; (o) and therefore if there is any thing ſhewing the teſtator intended to confine it to the ſtock he "had at the time of his death, it ſhall be ſo, and will "turn it the other way, that the intent may be complied "with; and for this I agree perfectly with the reſolution "of (p) *Aſhton* v. *Aſhton*." Conſider therefore how the preſent caſe differs from *Pierce* v. *Snaveling*. Here the teſtator was poſſeſſed, at the making the will, of a ſum in *South Sea* annuities equal to what he gives and more: and can the court conſtrue him to intend that his executor ſhould purchaſe out of the perſonal eſtate in general? It ought to be taken, that he intended to give it out of that he had: and to rely on the word *my* is laying too great a ſtreſs upon it. It is true that in *Aſhton* v. *Aſhton* there was another circumſtance attending, of abſurdity in ſuppoſing the

gacies according to the intent of teſtator from the will and the circumſtances, whether he meant to confine it to the ſtock he then had.

* 1 Brown, 482. (o) 2 Brown, 18. (p) Talb. 152.

(426) the teſtator meant a circuity: but it is equally abſurd in the preſent caſe, to ſuppoſe that the teſtator did not intend to give out of what he poſſeſſed, though he had to the value and more, but that the executors ſhould purchaſe. But it is objected, that ſuppoſe the teſtator had ſold out before his death, whether that would have made an ademption of the legacy, or whether it ſhould be made good out of his general aſſets; for if ſpecific, it would have been an ademption? There is no neceſſity to determine that; but the court has been looſe in reſpect of ademptions of legacies by a diſpoſition in the teſtator's life: and it was ſo held in (q) *Partridge* v. *Partridge*, that if the teſtator gives part, and ſells out, and before his death purchaſes other ſtock, this ſhall not be an ademption, but the other ſtock ſo purchaſed ſhall paſs by the will: which, if compared to the caſes of land, would not be ſo. That depends on the difference between real and perſonal eſtate: that the perſonal acquired at any time before the death of teſtator will paſs by the will; but of land the teſtator muſt be ſeiſed at the time of making the will. But here the teſtator had more than to anſwer it; made no alteration; and intended therefore to give the quantity of ſtock out of that he was poſſeſſed of; which is a ſpecific legacy, which ſhall not abate in proportion with the reſt.

Caſe 183. Plummer *verſus* May, *March* 22, 1749-50.

THE bill was brought by an heir at law, to diſcover the circumſtances of the execution of a will, againſt the ſubſcribing witneſſes; one of whom demurred to the bill.

LORD CHANCELLOR.

One merely a witneſs cannot be made a defendant for diſcovery of what he is examinable to, unleſs intereſted; but he ought to plead thereto and ſupport it by

The principle is right, that you cannot make one a defendant to a bill who is merely a witneſs, in order to have a diſcovery of what he can ſay to the matter, though he is properly examinable as a witneſs; which would be very miſchievous, and give an opportunity to collect evidence any way to contradict and encounter that: and if that was barely the preſent caſe, I ſhould at once allow the demurrer. But as againſt a party intereſted, the plaintiff is intitled to have a diſcovery from him, if he is charged to be concerned in the fraud in obtaining it: and it is not his being made a witneſs, that will prevent this diſcovery.

But

(q) Talb. 227.

But you ſeem to have miſtaken your way, and ſhould have pleaded inſtead of demurring; for here is an expreſs charge that the defendants pretend to ſome right or (r) intereſt under the will. If you had pleaded to theſe matters, and ſupported that by an anſwer, denying the claim of any ſuch intereſt, it had been a good plea. But a demurrer muſt be admitting every thing well charged to be true. You have endeavoured to ſupport the demurrer by a diſclaim by an anſwer: but a demurrer cannot be ſupported by an anſwer as to the matters demurred to; becauſe that is bringing into it ſomething ſaid on the part of the defendant to ſupport an allegation, that the charges in a bill are not ſufficient; which is called a ſpeaking demurrer. an anſwer diſclaiming intereſt, and not demur. (427)

There is ſometimes a demurrer for want of parties; ſometimes a plea. A demurrer, where it appears on the face of the bill; but where it appears by way of averment, you muſt plead for want of parties: every thing neceſſary to ſupport the demand in the bill muſt be taken to be true by the demurrer; and this charge in the bill, that he is a party intereſted, is neceſſary. As to the general danger from ſuch a precedent there is no difficulty; for by the diſtinction before mentioned there is a plain way, if the truth of the caſe will bear it. Any witneſs may defend himſelf to ſuch a bill by pleading, and ſupporting it by an anſwer; which cannot be in a demurrer. This particular caſe does not appear under ſuch circumſtances that I will make any ſtrain to allow ſuch a demurrer, and ſhut out the plaintiff from having all the lights conſiſtent with the rules of law and equity. I am of opinion, there is not ſufficient ground on the face of the bill to allow the demurrer. Where a plea proper; Where a demurrer.

The only thing offered deſerving an anſwer is, that this is ſuch a matter that advantage might be taken of it by the plaintiff by examining him as a witneſs: that this amounts to an examination upon *voir dire*: and it is true, ſuch an examination may be; which puts him to his own oath. But the plaintiff is not bound to examine on *voir dire*: and that queſtion is aſked *diverſo intuito*, to have another relief; for this charge in the bill is ſuch, as if proved, may intitle the plaintiff to have a decree againſt him for an account, *&c.* But another anſwer is, an examination upon *voir dire* can only be where produced as a witneſs by the adverſe

(r) Which is neceſſary for plaintiff to ſhew in defendant in a bill for a diſcovery merely. 2 Vern. 380. 2 Atk. 394. 3 Wms, 311.

verſe party; for a man cannot examine on a *voir dire* his own witneſs produced by himſelf.

As it ſtands now therefore the demurrer muſt be overruled.

Caſe 184. Stapleton *verſus* Conway, *March* 30, 1750.

A Sum of 2000*l.* being charged by ſettlement upon an eſtate in *Nevis*, the queſtion was, what rate of intereſt it ſhould bear.

Money charged on an eſtate in *Nevis* ſhall carry only *Engliſh* intereſt.

It being inſiſted that where it was diſcretionary in the court, intereſt different from that of *England* may be given, and this being a ſum of money to be raiſed out of an eſtate, it muſt be conſidered as coming out of a fund in that iſland, and to bear the rate of intereſt there, *viz.* 10*l. per cent.* for ſo much is the money worth there; and this not being a debt or loan, ſtood clear of any objection upon the ſtatute of uſury.

(428)

On the other ſide it was ſaid, this was like a common legacy carrying common intereſt; ſuppoſe it was a legacy given in *England*, and the teſtator had charged it on an eſtate in *Nevis*, the court could not give 10*l. per cent:* yet that is no doubt.

Lord Chancellor.

I am of opinion there is no ground to direct *Weſt Indian* intereſt: where it has ariſen by contract in *America*, by force of that contract, agreeable to the laws of thoſe countries, the court has been obliged to follow it: but where it is a voluntary diſpoſition by will or deed, and nothing ſaid about intereſt, and the court is to act according to its diſcretion, it has never given higher than the legal intereſt in *England*, not even upon a mortgage made in *England* on an eſtate in the *Weſt Indies*: as that would be a method to evade the ſtatutes of *uſury* in ſeveral inſtances. For if there is an eſtate in the plantations, out of which there could be good ſecurity, and the courts here ſhould ſuffer a mortgage to be made at the intereſt money carries there, that method might be taken to evade the ſtatutes of *uſury*; for the contract made in *England* would be as much againſt the ſtatutes as any other contract againſt what the law allows. But that is not the queſtion here, but being to act according

according to diſcretion, the court will direct intereſt at 5 *per cent.*

Another queſtion was whether intereſt ſhould be given for arrears of an annuity.

Lord Chancellor ſaid there had certainly been caſes where that has been given: eſpecially to a jointreſs for a long and obſtinate delay of payment, and frequent demand of the money; but it not appearing here what demands were made for the money, he could not direct intereſt for it; the utmoſt was to reſerve it till after the account taken.

Intereſt ſometimes given for the arrears of an annuity where frequent demand made.

Verney *verſus* Verney, *April* 2, 1750. Caſe 185.

(s) LADY *VERNEY* being tenant for life, and her ſon remainder man in tail, under the will of *The late Maſter of the Rolls*; upon a petition, preferred merely for the direction of the court, a queſtion was made whether a proportion of the fine, upon the renewal of a leaſehold eſtate in truſt, ſhould be paid by the tenant for life: for which was cited *Limbroſo* v. *Francia*, where his Lordſhip directed tenant for life to bear one third of the fine.

A leaſe for lives being deviſed in truſt for *A.* for life, remainder to *B.* in tail, *A.* not being one of the lives ſhall contribute one third of the fine on renewl.

On the other hand it was ſaid that if this was adverſe, the court would not compel her to pay any part of the fine: the teſtator having left this leaſehold to the one for life, remainder to the other, without ſaying any thing of the renewal, or any direction ſhewing an intention that this leaſehold ſhould be kept in the teſtator's family; and nothing in the will that ſhews the tenant for life ſhould contribute as the lives dropped. If the tenant for life was one of the lives the court would certainly never compel it: for no renewal would then be an additional advantage. In the caſe cited, the court held the renewed leaſe muſt be ſubject to the former truſt: but did not lay it down as a rule that ſhould be the proportion, let the other lives be what they would.

LORD CHANCELLOR.

Whoever has ſuch a leaſe for lives of a church or college, (t) which is originally renewed, he always thinks upon his ſettling or deviſing it, that he is ſettling a continuing

(s) 1 Brown 440. (t) 2 Wms. 459.

ing intereſt, longer than the lives in that leaſe: and in that light the court conſiders it; and therefore conſiders all renewals ariſing out of that leaſe to be part of it, and upon the ſame truſt. Firſt conſider how this would be if it was a deviſe of the legal eſtate. If there is ſuch a leaſe in which the life of the deviſee or grantee for life is one of the lives upon which the leaſe is held, and it is a deviſe of the legal eſtate, that tenant for life will not be compelled to contribute to a renewal, becauſe his intereſt is only for life, and that life is in the leaſe: the original intereſt given muſt be cotemporary and commenſurate with the intereſt deviſed and ſettled; and conſequently that tenant for life need not look out for a renewal, becauſe it cannot be for their intereſt: ſo that having nothing to do with it, the fine and charges of renewal muſt be paid by the remainder man. But the preſent is a deviſe to truſtees, which I think differs in circumſtance; for *ceſtuy que truſt* can take nothing but in the conſideration of this court; and the truſtee has a power at law to enter on the eſtate, and may ſell it. And yet in ſuch caſe if *ceſtuy que truſt* for life was one of the lives, I ſhould doubt whether ſuch *ceſtuy que truſt* could be compelled to contribute. But that is not the preſent caſe; all theſe lives being ſtrangers to *ceſtuy que truſt* for life; and therefore as all may die during the continuance of her eſtate and intereſt, ſhe has a chance for a benefit ariſing from this renewal; and ſo has her ſon only a chance; for
(430) if he ſhould die without iſſue in life of the mother, he has no benefit of that leaſe. The intent of the teſtator certainly was, that the leaſe ſhould continue and be kept on foot; and it muſt be ſo in ſome way: and what method is there, but by making all who have a chance for a benefit contribute? This queſtion ariſes from the ſhortneſs of the penning the will, and the not providing for a renewal; which is often done in wills of leaſehold eſtates held of a college or church, leſt the college or church ſhould take advantage of its being otherwiſe. Yet ſomething muſt be done for a renewal, though not mentioned. But there is a particular reaſon in this caſe for the court to direct a renewal, and that the mother and ſon ſhould contribute, from the direction for payment of debts, for if it was neceſſary to apply this eſtate for payment of debts, in that caſe the leaſe muſt be renewed; which could not be out of the creditor's intereſt, who muſt be paid out of the teſtator's eſtate; nor out of the rents and profits, which would bring the whole burthen on the tenant for life. It muſt be done in an equitable way, by a contribution of every one who is to take a chance in the benefit of the ſucceſſion provided

vided for by the will. The proportion muſt be by the mother's paying one third of the fine and charges of renewal: the other to be paid out of the rents and profits of the ſon's eſtate: and that computation of tenant for life bearing one third, the court has ſaid, particularly Lord *Macclesfield*, to be a wrong rule, as being too low.

Lord *Portſmouth verſus* Lord *Effingham*, *May* 9, 1750. *Vide Strange* 1267.

Caſe 186.

JAMES Earl of *Suffolk* in 1687, made a ſettlement to the uſe of himſelf for life; remainder to his firſt and every other ſon; remainder to Earl *Henry* for 99 years, if he ſo long lived; remainder to truſtees to preſerve contingent remainders; remainder to his firſt, *&c.* ſon; reverſion to his right heirs.

Two recoveries were ſuffered by Earl *Henry* and his ſon in 1714 and 1721; but the truſtees did not join therein. The plaintiffs claimed as heirs at law to Earl *James*: Lord *Effingham* under the recoveries. It was directed to be tried, and that upon a confirmation of the jointure of Lady *Suffolk* the deeds ſhould be produced; which however was not done till after the hearing upon the equity reſerved. A verdict was for the plaintiffs againſt the recoveries.

Bill of review on new matter ſince it could have been made uſe of in the former cauſe; with a probability of being relevant.

Lord *Effingham* now petitioned for a bill of review, upon new matter diſcovered ſince the decree upon the production of the deeds, *viz.* a diſcovery of two deeds, one in 1649, the other in 1654; with an affidavit that theſe deeds came to the petitioner's knowledge ſubſequent to the time of the trial. The firſt was a conveyance by the ſame Earl *James*, creating, ſubject to portions, a contingent truſt for himſelf in fee, if alive at the determination of the ſpecial truſt; if not alive, a truſt to the heirs-male of his body: if none, to the heirs-male of the body of a prior anceſtor. The other deed in 1654, in which the truſtees in the former deed joined with Earl *James*, was by bargain and ſale for a particular truſt, for the benefit of one of the daughters, who had one of the portions (the other being then dead) and then to the truſtee's own uſe.

(431)

For the petitioner. The bill being brought by the heirs at law, ſuggeſting that all the previous limitations were at an end, Lord *Effingham*, a ſtranger to the deeds, reſted his title on the facts then diſcovered, the recoveries; as to

to the objection to which for want of the truſtees joining, a court of law preſumes every thing poſſible in ſupport of common recoveries; as a good tenant to the *præcipe*, unleſs the contrary ſhewn. 1 *Ven.* 257. 2 *Lut.* 1549. 2 *Mod. Ca. Webber* v. Lord *Montruth*, which was carried farther in a late caſe of Mr. *Greenvil* in *B. R.* where the jury preſumed a ſurrender by a jointreſs to make a good tenant to the *præcipe*. In a caſe on the will of *Elias Turner*, who had deviſed a large eſtate to a charity, there was a verdict in favour of the will; and upon a ſecond information for a perpetual injunction to quiet the truſtees for the charity, a final decree was made; and on application by Mr. *Montgomery* the heir at law, for another trial, it was refuſed: it happened that before the filing the ſecond information he had married the daughter of *Jacob Sawbridge*, and ſo diſcovered ſeveral letters written by the teſtator, and therefore begging not to be examined; who was notwithſtanding examined on the trial, and the material witneſs, upon which the jury found their verdict. Though the intimation he received from his wife was ſufficient to put him on the ſcent, yet as he had not the uſe of thoſe letters at the trial, that was not thought an obſtacle to his having the benefit of that new diſcovered evidence. But here the petitioner had not the leaſt intimation before the time of the trial. Had this diſcovery been made, the plaintiffs could not have recovered in the ejectment; for at the time of the ſettlement in 1687, the legal eſtate was out of Earl *James*. There was no neceſſity for the truſtees joining, as appears from the deed in 1649; for the legal eſtate continuing in the truſtees, Earl *James* by the ſettlement in 1687 conveyed nothing but a truſt eſtate: and there is no occaſion for truſtees to ſupport contingent remainders, where the ſettlement is merely of a truſt eſtate; for though there are none, the original truſt may be ſufficient to ſupport the inheritance; as held by your *Lordſhip* in *Hopkins* v. *Hopkins*, and *Chapman* v. *Bliſſet*, ſo that this being an equitable eſtate, they are good equitable recoveries. The new matter therefore is relevant and material, and ſuch as
(432) probably might have occaſioned a different determination.

For plaintiffs. Two things are neceſſary for the petitioner; firſt, that this is a new diſcovery, not only to himſelf, but to any agent of his, ſince the time he could have made uſe of it; for the knowledge of agents is as ſtrong as that of the party: ſo held by the *Lords* in *Norris* v. *Le Neve*. Secondly, that this would be relevant, ſo that if brought into the cauſe, it would vary the decree; for a bill

bill of review muſt be on error apparent in the body of the decree; or new matter, which could not be taken advantage of before. 1 *Chan. Ca.* 43. The petitioner had ſeveral opportunities of reading the deeds; which if not done, it was their own fault; and the verdict muſt be taken to be right, for no objection thereto can be a ground for a bill of review. But ſuppoſing this a new diſcovery, there is not ſufficient probability that it will be relevant. If theſe two deeds had been produced, they could not have nonſuited the plaintiffs; they were made with a view to the troubles at that time, and notwithſtanding them, the legal eſtate muſt be underſtood to be in the ſeveral parties claiming under the ſettlement in 1687. It cannot be ſuppoſed in the truſtees; for a court of law or a jury will preſume there was a conveyance of the legal eſtate to Earl *James*. The truſts of the deeds were all executed before 1687, upon the portions being paid: he might have got the eſtate by diſſeiſin of the truſtees, for it is an honeſt diſſeiſin by *ceſtuy que truſt* of his own truſtees, for a particular purpoſe. Theſe truſtees could not have brought any kind of ſuit for recovery of the poſſeſſion: could not maintain an ejectment even independent of the ſtatute of limitations. So that after this length of time, the court will preſume a reconveyance. In *Greenville*'s caſe there was a double preſumption: firſt of a ſurrender; next of a deed to make a tenant to the *præcipe*. *Ven.* 257. ſhews how ſtrong preſumption goes after length of time; for there the court preſumed a licence, though abſolutely neceſſary by an act of parliament. * A mortgagee never in poſſeſſion, has his intereſt paid him; his right is thereby conſidered as kept up for many years: if he enters into poſſeſſion, and continues twenty years, the ſtatute of limitations runs againſt the mortgagor at law and in equity. So of a truſt if kept up, but the truſtee never enters. It is otherwiſe where the truſt is at an end, and not meant to be kept up: and the preventing keeping up titles is the ground of this preſumption of their reconveying the eſtate, from their ſuffering others to enjoy it: and therefore in a fine conveyancers take no notice of truſtees ſo remote: for how can the heir at law of a truſtee who died ſo long ago be found? Here is time enough to bar a writ of right; and conveyancers never inquire into a title farther than ſixty years. The acts of the parties are all upon a ſuppoſition that they were the legal owners ever ſince the ſettlement by Earl

* Mr. *Wilbraham* ſaid he had the book in which was entered in Lord *Harcourt*'s own hand a note of a caſe of *Lewis* v. Sir *Thomas Willoughby*, *Mich.* 4 *Anne*, where the like preſumption was allowed after 49 years.

Earl *James*, who alſo took himſelf to be ſo. The authority of the caſes of *Hopkins* and of *Chapman* muſt be admitted, that where a truſt eſtate is created in fee, and limited for life, remainder to the firſt, *&c.* ſon, there is no occaſion for truſtees to ſupport the contingent remainders; for if any gap, the original truſt will be ſufficient to ſupport it. But that cannot be applied to the preſent caſe; which is not a queſtion whether truſtees to ſupport contingent remainders are neceſſary, but whether it is not neceſſary to make the truſtees of the freehold truſt, tenants to the *præcipe* in order to ſuffer a recovery. It is a rule, to which there are few exceptions, that a truſt eſtate in the eye of this court, as to the rules of property, ſhall be conſidered exactly in the ſame light, as legal eſtates would be in acourt of law; and the court is ſorry to ſee an exception thereto. One there is in the caſe of *dower*; the reaſon of which is ſuppoſed to be, that it got into practice in too many caſes before. But as to *tenant* by *curteſy*, your *Loraſhip* has eſtabliſhed that the truſt eſtate thereof ſhould be juſt, as of the legal eſtate. Then eſtates tail, and remainders of a truſt eſtate, are barrable in the ſame way as of legal eſtates, upon the principle that equity follows the law: ſo that it is as neceſſary to have a tenant to the *præcipe* of a truſt, as of a legal eſtate: if otherwiſe, a court of equity would ſuffer it to be barred by bargain and ſale. Though it was formerly doubted, it is now ſettled that this court will not ſuffer tenant in tail of money to be laid out in land to bar it, but by a recovery. If there is a jointreſs of a truſt eſtate, remainder to her ſon in tail, the court would not let the ſon ſuffer a recovery without the conſent of the jointreſs: had the court been applied to before the recovery, to have the truſt executed according to the uſes in 1687, the court would have directed truſtees to preſerve the contingent remainders to be inſerted; than a recovery could not be ſuffered without making them parties: ſo muſt it be now it is *in fieri*; otherwiſe that tenant for 99 years would have a better title to bar than if it had been executed.

Caſburn v. *Engliſh.* *Hearle* v. *Greenbank.* Ante.

LORD CHANCELLOR.

Suppoſe as things then ſtood, before the recovery, a bill had been brought for a conveyance of the legal eſtate. Earl *Henry* being tenant for 99 years, if he ſo long lived; his ſon born, and ſo the contingent remainder veſted: in decreeing that conveyance, would the court have decreed truſtees to preſerve contingent remainders to be inſerted?

(434)

For

For plaintiffs. According to the nature of this, it would have been ordered; the intent being to ſupport all the remainders over, and not only the next immediate. *Lawton* v. *Lawton*, 2 *Will.* 379. *Winnington* v. *Winnington*, and *Tipping* v. *Pigot*, *Eq. Ab.* are all authorities that theſe truſtees are inſerted that it ſhould not be in the power of the tenant for 99 years, and the remainder man, his ſon, to bar it.

LORD CHANCELLOR.

I cannot ſay but that I am in ſome ſort of doubt in my own mind what is proper to do. But conſidering this application is within a reaſonable compaſs of time, but a year and a half after the final decree, and that upon a title, on which the right to this eſtate has never been conſidered either in law or equity; it would be too hard, provided the petitioner has brought himſelf reaſonably within the rules of the court, to refuſe it. I ſhould be ſorry if the conſequence of it ſhould occaſion much more expence in this family: but if it does, that is not a reaſon why the court ſhould cut matters ſhort, and prevent the bringing the right to the proper method of being conſidered, which has not yet been tried. As to what paſſed at the trial, I do not know that they could bring a bill of review; for if not ſatisfied with it, they ſhould apply to this court for a new trial; which upon conference with the judge, might have been directed.

There are two points, which are always proper to be attended to on ſuch a petition. Firſt, whether it is ſhewn that this new matter, upon which ſuch a bill is ſought, has come materially and ſubſtantially to the knowledge of the party or his agents, which is the ſame thing, (u) ſince the time of the decree in the former cauſe, or ſince ſuch time as he could have uſed it to his benefit and advantage in the former cauſe? Secondly, whether or no there is probable cauſe made, that new matter may be relevant to it?

As to the firſt, I think it is ſufficiently made out to my ſatisfaction: and if in a caſe of this ſort, relating to an eſtate in a great family, where there are a vaſt number of deeds relating to the title of that eſtate, the court ſhould hold by a ſtricter rule, it may be attended with great inconvenience. And I ſhall the leſs chuſe to go by a ſtrict rule, becauſe the parties, particularly the plaintiffs and the defendant Lady *Suffolk*, have not purſued the direction in the decree, and the intent thereof; but poſted on this cauſe

(u) 2 Vol. 576.

cauſe to a trial without it. That intent and direction was, that the jointure ſhould be confirmed before the deeds were produced, and conſequently before the cauſe ſhould be tried; for it muſt by the decree be aſcertained by affidavit, (435) which has not been done, but the plaintiffs lay by, not executing the deed of confirmation; which ſhe was ſo complaiſant as not to inſiſt on. But an affidavit is produced, importing in itſelf an admiſſion by Lord *Effingham*, that there was ſome inſpection of ſome deeds at leaſt. But then it is poſitively ſworn by him and his two ſolicitors, that until a conſiderable time afterward they had not notice or apprehenſion that any ſuch deeds were in being, as theſe mentioned. And though the affidavit is liable to ſome exception and cavil, I will not refuſe a bill of review upon nice exceptions thereto. Then this is anſwered only by information and belief; for her ſolicitor has made no affidavit that there was ſuch an inſpection as was deſired; nor can I compel him, or examine him *viv voce*. But taking it together with that information and belief: and ſuppoſe in ſuch a noble family, and ſo many deeds, which all want to be turned over to ſee what they are, agents, not very fully informed, happen to paſs over particular deeds that may be material to the title: if that ſhould be conſtrued ſuch preſumptive notice to the client, againſt his being let in, to have the benefit of his title, it would be fatal. In the caſe of *Jacobſon*, a bill of review was allowed by Lord *Harcourt*, upon letters and writings that were in the cuſtody of the party praying it; yet it was granted on the foundation of its being looked upon as an old box, containing immaterial writings. Conſidering therefore all the circumſtances, this affidavit ſtanding unanſwered otherwiſe than by information; there is a ground for it.

Which brings it to the merits: as to which it is impoſſible to ſay with certainty theſe are clear points; which is a ſufficient ground to grant it; for if a bill of review is applied for upon new matter changing the title, it is juſt it ſhould be brought, and let the party have the benefit of it at his peril. It is therefore ſufficient, if a probable cauſe of relevancy. Firſt conſider it upon the legal title. Suppoſing there was ſuch a title ſtanding out againſt Earl *James* when he made the ſettlement under which the plaintiffs claim, this is certain, that upon this queſtion concerning the title, it has never yet been tried; for it was tried on a ſuppoſition that the legal eſtate was in Earl *James*. Neither of theſe deeds then appeared; they are of different natures; and that in 1654 is upon the face of it

it to the truſtees own uſe. I do not ſay this, as believing this was the intent of the parties: but ſpeak only now as to the frame of the deed. As to what is inſiſted on either ſide, conſider how the deed in 1654 operates in a court of law. It is thirty-three years between that and the ſettlement in 1687, that is no very great length of time to induce ſuch a preſumption. I agree that if it ſhould appear in a court of law that there never was ſuch a poſſeſſion in the truſtees, and that Earl *James* did alone (which probably was the caſe) continue in poſſeſſion, and did acts of ownerſhip throughout, that may be ſtrong evidence to induce the court to believe it, or that he had diſſeiſed his truſtees; but I am not to ſay that here. It is to be tried by a jury, who are to judge whether there is ground to make ſuch a preſumption; and it would be going a great way to ſay that all the circumſtances of the diſſeiſin, *&c.* ſhould be laid before a court of equity. They are to be left to a jury; who take the liberty to judge one way or the other, as theſe circumſtances lead: and there is no certain rule; for they often preſume one way or the other: and it would be making the court take upon itſelf the office of a jury. There is a very great length of time from the deed in 1654 to the recovery in 1714; will the court preſume a reconveyance to the uſes of that ſettlement? If Earl *Henry* diſſeiſed the truſtees, he would gain an eſtate in fee: for he cannot diſſeiſe to gain a particular eſtate. This is not giving an opinion upon this; but to ſhew under what uncertainty I am preſſed to refuſe this bill, where it is impoſſible to infer, what a court of law and a jury would infer. (436)

This is ſuppoſing the legal eſtate in the truſtees in the deed in 1654. Next as to the equitable eſtate. The plaintiffs inſiſt the recovery is void for want of a good tenant to the *præcipe*. The general rule is, that equity is to follow the ſame rule the law does, as to the limitation of legal eſtates, though not ſo as to enable a perſon owner of the particular eſtate to deſtroy the ſubſequent limitations by wrong. Nor do I know that the courts of law have gone ſo far as to preſume truſtees to preſerve contingent remainders were made tenants to the *præcipe* in breach of their truſt. It is ſaid that, as in caſe of a legal eſtate, ſuch a recovery would not be good, becauſe no owner of the freehold joined; therefore if of an equitable eſtate, it would not be good. No particular caſe has been cited where that has been determined: and in a queſtion of this kind, even upon that, it is hard to refuſe a bill of review. But to conſider

ſider the reaſon upon which it is ſupported; becauſe the court ſtrictly follows the rule of a recovery in legal eſtates, and conſiders the truſtees as ſufficient truſtees to ſupport the remainders: it is true in *Hopkins* v. *Hopkins*, I was of opinion, that where a perſon ſeiſed of the legal eſtate made, a ſettlement to truſtees and their heirs, and all the ſubſequent limitations were declarations of the truſt, that the truſtees ſo appointed by the ſame deed would be ſufficient to ſupport it. That came not before Lord *Talbot*; but it appeared in *Popham* v. *Bamfield*, 1 *Wms.* to have been the opinion of *Trevor* C. J. in *Penhay* v. *Hurrel*. But this is different; for here it is not by the ſame deed: certainly, where there is a tenant for life in jointure, the court would not let the ſon ſuffer a recovery, becauſe there would be a plain freehold ſtanding out. But the point is here, theſe truſtees in the ſettlement in 1687, on a ſuppoſition Earl *James* had only a truſt eſtate, had no eſtate either in law or equity in them. At the making the ſettlement they were
(437) truſtees, ſuppoſing them truſtees at all, for Earl *James* and his heirs: even after making that ſettlement, and declaring the truſt, theſe truſtees interpoſed between the eſtate for 99 years to Earl *Henry* and the remainder to his ſon, could take nothing either in law or equity: in law nothing, becauſe the grantor in the deed had no legal eſtate in him: in equity nothing, becauſe not intended to take any equitable intereſt, but only to ſupport contingent remainders. It will deſerve to be conſidered, upon what truſt the new truſtees in the deed of 1654, were to be truſtees; and whether they can be truſtees to ſupport contingent remainders, of which truſt they had no notice at all: or whether they will not be truſtees in ſuch a manner as that Earl *Henry* himſelf had the equitable freehold in him at time of the recovery? This not an opinion: but it may be ſo argued. Theſe therefore are new queſtions, for which there is no authority; and it is hard, when the petitioner comes within ſo ſhort a compaſs of time, to deny the having it conſidered in a regular legal way. It is clearly a new caſe, of a title at law never yet tried; and a point of equity before the court never conſidered in this cauſe, and never *in ſpecie* in other cauſes.

On the whole therefore I am of opinion, the petitioner ſhould be at liberty to bring a bill of review, to reverſe or alter the decree upon the new matter alledged.

Potter

Potter *verſus* Potter, *Rolls*, *May* 7, 1750. Caſe 187.

THE plaintiffs were *Thomas Potter*, ſecond ſon and deviſee in the will of the late Archbiſhop of *Canterbury*, and the other younger children and grandchildren of the teſtator: the defendants were *John Potter*, eldeſt ſon and heir, the executors, ſome annuitants under the will, and *Iſaac Hughes*, with whom the teſtator had contracted for the purchaſe of a large real eſtate; on the circumſtances attending which treaty carried on in the teſtator's life, and on his will and codicils, the queſtions aroſe.

Poſt. 25 *June* 1750. *Rogers* v. *Gibſon*.

Lands contracted for by teſtator conſidered as his in equity, and paſs by general words of his *will or otherwiſe*, *&c.* after naming particular eſtates.

The caſe on the pleadings and proofs was this.

The teſtator, ſeiſed in fee of ſome manors and Lordſhips, and poſſeſſed of a large perſonal eſtate, 12 *Auguſt* 1745 duly made his laſt will in preſence of three witneſſes; deviſing, ſubject to an annuity, his three manors of *A. B.* and *C.* and all his meſſuages, lands, tenements and hereditaments, in the county of *Bedford* or elſewhere in any part of *England* to the uſe of *Thomas Potter* for life without impeachment of waſte, remainder to truſtees to preſerve contingent remainders, remainder to his firſt and every other ſon in tail-male; remainder in ſame manner to his eldeſt ſon *John Potter*, *&c.* remainder to the daughters of the teſtator and grand-daughters as tenants in common, not as jointenants, then ſome ſpecific and pecuniary legacies; and all the reſt and reſidue in truſt, that ſo much of the perſonal eſtate as at the time of his deceaſe ſhould not be placed out in any public fund, ſhould be inveſted in *South-Sea* or other public funds; and, as ſoon as a convenient purchaſe could be had, all the ſtock ſhould be diſpoſed of therein, and ſettled in the ſame way.

(438)

By a codicil on the back of the will he afterward gave additional legacies and annuities charged and payable in the ſame manner as the annuity in the will, and ratifying and confirming the will, dated 10th *April* 1747, and atteſted by three witneſſes in theſe words, "This will with the ſeveral additions and alterations above was ſigned, ſealed, and republiſhed, by the teſtator as his laſt will and teſtament in preſence of us the ſubſcribing witneſſes."

He afterward made another codicil on a ſeparate paper; which though not dated, was agreed to be about four or five days before his death, in preſence of three witneſſes: reciting, that having in his will appointed ſeveral limitations and remainders of his eſtate, ſome of which were not agreeable to his preſent intent, he revokes ſo much as ſhall be found inconſiſtent with that codicil; ratifying and confirming the other parts which ſhall not interfere therewith, the atteſtation of which paper is, "Signed, ſealed, publiſhed and declared by the teſtator as a codicil to the laſt will and teſtament."

October 10, 1747 he died, leaving this will and codicils, ſince proved and admitted by the defendant, heir at law, to be all duly executed ſo as to paſs the real eſtate to the deviſee to thoſe uſes.

The main queſtion was, whether the contract for the lands, treated for in the teſtator's life to be purchaſed, had at any and what time ſo far proceeded as to veſt an equitable title in the teſtator, though no conveyance was executed of the legal eſtate; the circumſtances of which were theſe:——

In 1743, there was a treaty between *Brown*, as agent for *Iſaac Hughes*, and the plaintiff and *Weſtly*, as agents for the teſtator, for that purchaſe. The plan and particulars of the eſtate were delivered to *Weſtly*: and *June* 7, 1744, the parties met, a price was fixed, and agreed by parol, that the purchaſe ſhould be completed the *Chriſtmas* following. In *July* 1744, the title deeds were delivered to *Weſtly* to abſtract and deliver to the teſtator's counſel; which was done *April* 1745. Further proceeding was interrupted by the claim of *William Huxley* to part of this eſtate. A bill was filed; and referred to the Maſter to inquire into this contract; who reported in *February* 1746,
(439) that it was a beneficial contract, and the next day *Weſtly* received directions from the teſtator to draw conveyances; which he did by preparing a leaſe and releaſe to make teſtator tenant of the freehold and inheritance for ſuffering a recovery to uſe of teſtator and his heirs, and a deed of bargain and ſale, which was approved on behalf of teſtator. *September* 17, 1747, they were carried to teſtator, who returned them to be ingroſſed: and they were actually ingroſſed in his life, but by his death were not executed as was intended. The other intermediate occurrences were, that the agreement for the price being in 1744, application

was

was made nor to fell any wood that winter, becauſe the eſtate was contracted for, and the purchaſe would be completed: that as to *Huxley*'s claim, plaintiff offered to advance money to complete the agreement, and gave a note, that whereas *Brown*, vendor's agent, agreed to pay 1200*l.* to *Huxley* for conveyance of his title, plaintiff agreed to pay 100*l.* part thereof, if *Brown* ſhould aſſign the ſaid title to ſuch perſon as plaintiff ſhould appoint; that plaintiff went down frequently, and let the eſtate as he pleaſed, becauſe it was looked on as contracted for.

The bill was to have an account of the perſonal eſtate, and this contract carried into execution, and the reſidue of the perſonal eſtate ſo applied, and the eſtate contracted for conveyed to the ſeveral uſes in the will and codicils.

The defendant contended for the validity of the contract; but inſiſted, the lands would not paſs by the will; the teſtator having no title to them before the will, becauſe no writing between the parties; and there being no republication of the will, the general words thereof would not reach this eſtate to the diſheriſon of an heir at law; who is favoured in equity ſo as not to be diſinherited by doubtful, but by expreſs words, and clear intent; not even by clear intent without expreſs words; which holds at law, but ſtronger in this court; and holds both as to the perſon to take, and the eſtate itſelf. It was ſtrange, the teſtator ſhould not make particular mention of this eſtate any where, or ſhew an intent to paſs it, if he intended it: but he could not intend by that general ſweeping clauſe to paſs a greater eſtate than what he had before particularly enumerated. The ſtatute of wills ſpeaks only of ſuch eſtates as the teſtator had at that time: indeed an agreement, though not in writing, yet if admitted between vendor and vendee, will be out of the ſtatute of frauds: ſo where there are other circumſtances, as the party's paying the money, the court will carry it into execution. But there is no authority, where there is a waver of the firſt agreement, and a new one gone into, that a court of equity has ſaid, the new ſhall have relation to the original agreement in order to diſinherit an heir at law, which is this caſe; for the time of giving the note was the *æra* of the valid contract to bind the parties. Although where the thing agreed on is to be carried into execution by ſeveral ſubſequent acts, as the former, is the foundation of the whole, the court will ſay, there ſhall be a relation to make it good: this is not ſuch a ſubſequent act as is neceſſary to carry the former into execution. Then as to the codicil, which may indeed be ſuch republication

republication of a will, that lands purchaſed after date of the will, if the words of the will are general enough, will paſs thereby; but it muſt be a codicil ſhewing neceſſarily ſuch an intent: otherwiſe the annexing the codicil and confirming the will, will not do. In 1 *Rol. Ab.* 618. and 2 *Ver.* 722, *Hutton* v. *Simpſon*, are inſtances, where though teſtator plainly ſhewed an intent his will ſhould ſtand, by the act he did, yet it was not a republication. The laſt codicil cannot be a republication; becauſe not by way of indorſement or annexed to the will, or ſhewn that the will itſelf was at that time before the teſtator. It is determined in this court, that the very will itſelf muſt be re-executed; and therefore this may be a good codicil, and yet no republication of the will. In *Litton* v. Lady *Falkland*, as cited in *Acherly* v. *Vernon*, *Comyns* 383, (where it is much better reported than in 2 *Ver.* 621) a codicil in a ſeparate paper was not a republication of the will. In *Martin* v. *Savage*, *Mich.* 14 *G.* 2, the teſtator declared, his will was in cuſtody of *Savage*, and that it was, and would be ſtill his will: the point was, whether this declaration, which was ſubſequent to a ſettlement by fine, which had revoked the will by altering the eſtate, was a republication of the will? Lord *Hardwicke* Lord *Chancellor* held, the parol evidence ſhould not be admitted, as it would elude the ſtatute of frauds; and that though a codicil has been held a republication, yet never, except the will has been before the teſtator.

Plaintiff inſiſted, that even at making the will, teſtator muſt be conſidered in equity as intitled to this eſtate, and that it paſſed by the general words: but if not, he was ſo before the codicils; each of which was a republication, and to be taken as a concomitant, not a ſeparate act. The ſtatute of *H.* 8. means, that teſtator ſhould be ſeiſed, if poſſible, but not of an eſtate in equity, which is impoſſible. He did not intend to die inteſtate; and it was prudent to leave it under ſuch general words. The contract was complete; the ſubſequent matter, as the ingroſſing, *&c.* being not conſidered as part; and the contract itſelf is different from the execution. Republication of wills are favoured (ſo ſaid in *Ver.*) that a man may not die inteſtate; which is not favoured. *Martin* v. *Savage* was only this; a huſband had declared the uſes of a fine levied by him and his wife, the uſes of which revoked the will; he afterwards declared the will ſhould ſtand.

Sir

Sir *John Strange*, *Maſter of the Rolls*, having taken time to conſider, now gave his decree. (441)

The queſtion ariſes on the general words after enumeration of the particular eſtates, on which it ſeems to be admitted (and if not, I ſhould have no doubt) that they will carry any other eſtate, he could be intituled to in law or equity at the time of the deviſe; for which, if it was neceſſary to cite authorities, there is 2 *Ver.* 679, *P. C.* 320, *Eq. Ab.* 211; which leads to the main queſtion between the deviſees and heir at law as to the contract. The vendor ſubmits to the carrying it into execution; and both parties contend for it, but with different views. (x) On the beſt conſideration I am of opinion, that this eſtate, ſo contracted for in life of teſtator, muſt be conſidered in equity as his eſtate, and well deviſed to the uſes in the will and codicils. As to the argument for defendant from being heir at law, *&c.* it is plain, that teſtator intended to die teſtate as to every part of his eſtate real and perſonal, and continued in that mind. What was his reaſon for ſo dealing with his ſon and heir, this court has nothing to do with. Here is a clear intent and expreſs words; and it is not pretended, that teſtator had any other lands, to which theſe general words could be applied, having particulariſed thoſe eſtates of which he was ſeized. His not mentioning theſe lands may be accounted for: by the will he had diſpoſed of all he had; what would be at his death, was uncertain; and therefore he uſed general words, that if completed it might paſs by the will; and inſerted the clauſe to lay it out in land, if not done before. To conſider the inſtruments: though there is no occaſion to reſt this on the will itſelf, yet I ſtrongly incline to think, that even were the codicils out of the caſe, the will itſelf would paſs the eſtate. One circumſtance indeed is wanting, the reducing this agreement into writing according to the ſtatute of frauds; which if done in *June* 1744, no doubt but this eſtate muſt be conſidered as his in equity from that time. But though an agreement is not reduced into writing and ſigned by the party, yet it is well known, that if confeſſed, or in part carried into execution, it will be binding on the parties, and carried into further execution as ſuch in equity; (y) and here is the fulleſt admiſſion thereof. It muſt therefore

Parol agreement confeſſed, or in part executed, binding.

(x) 1 Atk. 572. 2 Wms. 631. (y) Ante 33, 247.

therefore be decreed according to the caſe in *Eq. Ab.* 19, and the conſtant doctrine in this court: it will be the ſame, where vendor comes for ſpecific performance, and the agreement admitted. No doubt, but on ſuch admiſſion it will be conſidered as an agreement from the time of tranſaction; ſo that on a bill by either party, the court muſt have decreed execution, the eſtate as teſtator's from *June* 1744, and the money the vendor's. As to any partial execution before the will, it is ſo far carried into execution as to ſupply the want of writing on that head. Plaintiff was agent to his father, who approved of the agreement: it
(442) would be ſuch a carrying into execution on their parts, as would have intitled vendor to have gone on with the purchaſe: but if that was doubtful, it is admitted for defendant, that the time of giving the note, when *Huxley* agreed to join with vendor in making a title, was the effectual time, from whence it was his eſtate in equity: and if the firſt codicil is a republication, the new purchaſed eſtate will paſs thereby. But I cannot conſider the taking that note, *&c.* as waving the firſt agreement, and coming into a new one; but rather a further ſtep to carrying the original into execution, as removing an unforeſeen obſtacle, and with a view of proceeding with the contract. But could the defendant lay all the previous ſteps to that tranſaction out of the caſe, yet if this codicil is a republication, he muſt admit, the eſtate will paſs: and I am of an opinion, this codicil amounts to a republication. It anſwers their own idea of republication; being indorſed on the will, and atteſted as the ſtatute require. The word *republiſhed* is uſed; which puts it out of doubt; but if not, it would have amounted to a republication, as operating by additional charge on the real eſtate, and then concluding by ratifying and confirming the will. In all caſes of republication no preciſe form of words is neceſſary; but any, denoting the continuance of teſtator's mind, ſo far as he makes no alteration, will do. 1 *Roll. Ab.* 617, Z. 1. Theſe words *therefore* or *elſewhere*, *&c.* muſt be conſtrued to take in all lands, to which he had a title in law or equity, wherever in *England*; and the heir at law does not diſpute, but that before 10 *April* 1747, this was in equity teſtator's eſtate. The next inſtrument relied on for the plaintiff is the codicil made a few days before his death. The ſteps taken before the firſt codicil, brought the tranſaction to the drawing the conveyances, *&c.* which were actually ingroſſed, and would have been executed but for his death. The defendant is forced to admit, that if that codicil could be a republication, the new purchaſed lands paſs:

Where a codicil is a republication of a will.

No preciſe form neceſſary thereto.

paſs: and I am of opinion it amounts thereto notwithſtanding his objections. It is an expreſs declaration, that the reſt of his intent, not inconſiſtent therewith, ſhould continue and be confirmed: it might be miſchievous to conſtrue, that no republication could be but by the teſtator's taking the will in his hands, and republiſhing that by indorſement on it, or annexing the codicil to the will itſelf. The law in favour of the power of deviſing, has diſpenſed with many forms of expreſſion, which would be abſolutely neceſſary in other inſtruments; and will infer republication from an act done: as in 1 *Roll. Ab.* 617: the perſon intending to republiſh may be at a diſtance from the will itſelf; or may not have it in his power by its being in another's cuſtody, and might know the ſubſtance, though he cannot repeat the particulars. When the codicil in *Litton* v. Lady *Falkland*, reported at large in 3 *C. Rep.* and this are compared together, there is ground to hold one a republication, though the other not. The codicil there was only an addition of ſome pecuniary legacies, and therefore not intended to operate on or affect the lands: but here the whole purport of the laſt is to vary the limitations in ſome particulars, ratifying the will in all the reſt: in 2 *Ver.* 625, no notice is taken of that objection in *Comyns*, of the not annexing the codicil: and this is the ground of that determination in 1 *Roll. Ab.* 618. In *Acherly* v. *Vernon*, *Comyns* 381, the codicil was not indorſed or annexed to the will, and there as here, was an alteration and ratifying the will in all other reſpects. It was objected there, that it was on a ſeparate paper, *&c.* but Lord *Macclesfield* held, the teſtator's ſigning and publiſhing the codicil in preſence of three was a republication of the will, and both together made but one inſtrument; ſo that the after purchaſed lands paſſed by the general words, although made by diſtinct inſtruments: and that is the later caſe, and confirmed in the *Houſe of Lords*. In *Litton* v. Lady *Falkland*, though the codicil had been annexed to the will, yet I ſhould think it not a republication as to the lands. *Hutton* v. *Simpſon*, 2 *Ver.* 722 ſhews, that republication depends on the ſubject matter, not the annexing. (z) This laſt codicil was therefore a republication, and

Need not be indorſed or annexed to the will.

(443)

(z) 2 Wms. 334. Cro. Eliz. 493, 3 Atk. 180. Douglas 69. Cow. 158. 3 Brown, Parl. Cas. 101. 1 Vol. 492. In 2 Vern. 625, it was held, that a codicil concerning the perſonalty, is not a republication ſo as to paſs lands purchaſed after the making of the will; and in 2 Vol. 626, it was held, that a codicil directing a will to ſtand, will not extend to a lapſed or adeemed legacy: and in Prec Chan. 441, a codicil was held no republication of the will, but theſe were determined on the circumſtances of each caſe, and the intention not ſufficiently appearing.

and paſſed the eſtate under the general words of the will, if it had not paſſed before, as I think it had; and all three inſtruments muſt be taken together, and make but one will.

Caſe 188. Samſun *verſus* Bragington, *Rolls* May 15, 1750.

A ſhip pledged abroad by the maſter for expences, &c. well hypothecated, and the part owners liable.

A Maſter of a ſhip having pledged the ſhip for the expences, &c. laid out upon her abroad, the queſtion was, whether the part-owners were thereby liable; the defendants inſiſting that, this being a contract abroad, by the civil law, or as received here among merchants, the maſter has no right farther than to hypothecate the ſhip, not to make his owners liable.

Againſt which it was ſaid, that a captain of a ſhip has a power to charge his owners perſonally, as if it was money borrowed by the owners, in the ſame manner as where a debt contracted by a ſervant will charge the maſter perſonally; which perſonal obligation is not gone by, or inconſiſtent with, the pledging the ſhip. *Thomas* v. *Terry*, *Eq. Ab.* 139, *Speering* v. *Degrave*, 2 *Ver.* 643, and this is on a contract, laid out for the purpoſes of the ſhip, and for benefit of the owners.

Ante, 154. Buxton *v.* Snee, *November* 15, 1748.

Sir *John Strange Maſter of the Rolls*, ſaid, that caſe in *Ver.* ſeemed to be a tranſaction at home: and it was common, that if materials were furniſhed by tradeſmen, they might bring an action againſt either. All the civil law ſays, is only on the general power of the maſter to hypothecate the ſhip, and make uſe of it as a fund or credit in a place, where no other could be had. (a) But there is no caſe, where the maſter of the ſhip being abroad takes up money for neceſſaries, whether that can perſonally charge the owners, or whether the whole lien is on the ſhip. This power of hypothecating has nothing to do with, nor is it by virtue of the common law, but from neceſſity and the law of nations. In general to ſay, the maſter cannot bind the owners by any act, is going too far.

(444)

His Honour took time to conſider of it; and afterward (as I was informed) determined, that the ſhip was well hypothecated, and that part owners were liable.

Pen

(a) Ante. 154, and the caſes there cited.

Penn *verſus* Lord Baltimore, *May* 15, 1750. Caſe 189.

Specific performance decreed of articles executed in *England* concerning boundaries of two provinces in *America*.

THE bill was founded on articles, entered into between the plaintiffs and defendant 10 *May* 1732, which articles recited ſeveral matters as introductory to the ſtipulation between the parties, and particularly letters patent granted 20 *June*, 2 *C.* 1. by which the diſtrict, property, and government, of *Maryland* under certain reſtrictions is granted to defendant's anceſtor his heirs and aſſigns: farther reciting charters or letters patent in 1681, by which the province of *Pennſylvania* is granted to Mr. *William Penn* and his heirs; and ſtating a title to the plaintiffs derived from *James* Duke of *York*, to the three lower countries by two feoffments, both bearing date 24 *Auguſt* 1682. The articles recite, that ſeveral controverſies had been between the parties concerning the boundaries and limits of theſe two provinces and three lower counties, and make a particular proviſion for ſettling them by drawing part of a circle about the town of *Newcaſtle*, and a line to aſcertain the boundaries between *Maryland* and the three lower counties, and a proviſion in what manner that circle and line ſhould run and be drawn; and that commiſſioners ſhould do it in a certain limited time, the final time for which was on or before 25 *December* 1733. There was beſide a proviſion in the articles, that if there ſhould be a want of a *Quorum* of commiſſioners meeting at any time, the party, by default of whoſe commiſſioners the articles could not be carried into execution, ſhould forfeit the penalty of 5000*l.* to the other party: and a proviſion for making conveyances of the ſeveral parts from one to the other in theſe boundaries, and for enjoyment of the tenants and landholders.

The bill was for a ſpecific performance and execution of the articles: what elſe was in the cauſe, came by way of argument to ſupport, or objection to impeach, this relief prayed.

When the cauſe came on before, it was ordered to ſtand over, that the *Attorney General* ſhould be made a party; who now left it to the court to make a decree, ſo as not to prejudice the right of the crown. (445)

The firſt objection for defendant was, that this court has not juriſdiction nor ought to take cognizance of it; for that the juriſdiction is in the King and council.

Second objection, that if there is not an abſolute defect of juriſdiction in this court, yet being a proprietary gogernment

vernment and feudary ſeigniory held of the crown, who has the ſovereign dominion, the parties have no power to vary or ſettle the boundaries by their own act; for ſuch agreement to ſettle boundaries and to convey in conſequence, amounts to an alienation, which theſe lords proprietors cannot do: but ſuppoſing they may alien entirely, they cannot alien a parcel, as that is diſmembering; for which there is a rule in the feudal books concerning *Feuda indiviſibilia*.

Thirdly, this agreement ought not to be carried into execution by this court; as it affects the eſtates, rights and privileges of the planters, tenants and inhabitants within the diſtrict, and the tenure and law by which they live, without their conſent.

Fourthly, ſuppoſing all this anſwered, yet this agreement is not proper to be eſtabliſhed from the general nature and circumſtances. Firſt, as it is merely voluntary, and the court never decrees ſpecifically without a conſideration. Secondly, as the time for performance is lapſed. Thirdly, that theſe articles are in nature of ſubmiſſion to arbitration, which cannot be ſupplied by interpoſition and act of this court. Fourthly, that defendant was impoſed on or ſurprized in making this agreement. Fifthly, that if there was no impoſition or fraud, defendant groſsly miſtook his original right; and under that miſtake and ignorance, the articles were founded and framed. Sixthly, the agreement in ſome material parts is ſo uncertain, that it cannot be decreed with certainty according to the intent of the parties, for that no center is fixed; without which it is impoſſible to make a circle: nor is it ſufficiently deſcribed, whether it ſhould be a circle with a radius of twelve miles or only a periphery of twelve miles. Seventhly, there is a covenant for mutual conveyances; whereas the plaintiffs have no eſtates in the lower counties, ſo as to make an effectual conveyance to defendant; and an agreement muſt be decreed entirely, or not at all, on the plaintiff's own ſhewing the legal eſtate and property is in the crown: ſo that at moſt they have but an equitable right, in which the crown is truſtee; and then this court cannot decree a conveyance. In *Reeve* v. *Attorney General*, 1741, (446) lands were deviſed to a wife, and after her death to be ſold, and the money to be divided among the plaintiffs: the teſtator died without heirs; ſo that the legal intereſt in the eſtate deſcended to the crown, but with a truſt to be ſold. On a bill to have the will eſtabliſhed, and to hold againſt the crown, or the lands ſold, *His Lordſhip* diſmiſſed the bill; and ſaid, where the crown was truſtee,

tee, the court has no juriſdiction to decree a conveyance; but they muſt go to a petition of right. Eighthly, this court cannot make an effectual decree in the cauſe, nor enforce the execution of their own judgment.

LORD CHANCELLOR.

I directed this cauſe to ſtand over for judgment, not ſo much from any doubt of what was the juſtice of the caſe, as by reaſon of the nature of it, the great conſequence and importance, and the great labour and ability of the argument on both ſides; it being for the determination of the right and boundaries of two great provincial governments and three counties; of a nature worthy the judicature of a *Roman* ſenate rather than of a ſingle judge: and my conſolation is, that if I ſhould err in my judgment, there is a judicature equal in dignity to a *Roman* ſenate, that will correct it.

It is unneceſſary to ſtate the caſe on all the particular circumſtances of evidence; which will fall in more naturally, and very intelligibly, under the particular points ariſing in the cauſe.

Decrees in *ſpecie* preferable to damages at law.

The relief prayed muſt be admitted to be the common and ordinary equity diſpenſed by this court; the ſpecific performance of agreements being one of the great heads of this court, and the moſt uſeful one, and better than damages at law, ſo far as relates to the thing in *ſpecie*; and more uſeful in a caſe of this nature than in moſt others; becauſe no damages in an action of covenant could be at all adequate to what is intended by the parties, and to the utility to ariſe from this agreement, *viz.* the ſettling and fixing theſe boundaries in peace, to prevent the diſorder and miſchief, which in remote countries, diſtant from the ſeat of government, are moſt likely to happen, and moſt miſchievous. Therefore the remedy prayed by a ſpecific performance is more neceſſary here than in other caſes: provided it is proper in other reſpects: and the relief ſought muſt prevail, unleſs ſufficient objections are ſhewn by defendant; who has made many and various for that purpoſe.

Juriſdiction of the court tho' ſubmitted to by anſwering, yet if

Firſt, the point of juriſdiction ought in order to be conſidered: and though it comes late, I am not unwilling to conſider it. To be ſure a plea to the juriſdiction muſt be offered in the firſt inſtance, and put in *primo die*; and anſwering

a want of it appears at hearing, no decree.

ſwering ſubmits to the juriſdiction: much more when there is a proceeding to hearing on the merits, which would be concluſive at common law: yet a court of equity, which can exerciſe a more liberal diſcretion than common law courts, if a plain defect of juriſdiction appears at the hearing, will no more make a decree, than where a plain want of equity appears.

Original juriſdiction as to bounds of proprietary governments in *K.* in council.

It is certain, that the original juriſdiction in caſes of this kind relating to boundaries between provinces, the dominion, and proprietary government, is in the King and council: and it is rightly compared to the caſes of the ancient *Commotes* and *Lordſhips Marchers* in *Wales*; in which if a diſpute is between private parties, it muſt be tried in the *Commotes* or *Lordſhips*;

But by the contract of parties brought within this juriſdiction.

but in thoſe diſputes, where neither had juriſdiction over the other, it muſt be tried by the King and council; and the King is to judge, though he might be a party; this queſtion often ariſing between the crown and one Lord-Proprietor of a province in *America*: ſo in the caſe of the *Marches* it muſt be determined in the King's courts, who is never conſidered as partial in theſe caſes; it being the judgment of his judges in *B. R.* and *Chancery*. So where before the King and council, the King is to judge, and is no more to be preſumed partial in one caſe than in the other. This court therefore has no original juriſdiction on the direct queſtion of the original right of the boundaries; and this bill does not ſtand in need of that. It is founded on articles executed in *England* under ſeal for mutual conſideration; which gives juriſdiction to the King's courts both of law and equity, whatever be the ſubject matter. An action of covenant could be brought in *B. R.* or *C. B.* if either ſide committed a breach: ſo might there be for the 5000*l.* penalty without going to the council. There are ſeveral caſes, wherein collaterally, and by reaſon of the contract of the parties, matters out of the juriſdiction of the court originally will be brought within it. Suppoſe an order by the King and council in a cauſe, wherein the King and council had original juriſdiction; and the parties enter into an agreement under hand and ſeal for performance thereof: A bill muſt be in this court for a ſpecific performance; and perhaps it will appear, this is almoſt literally that caſe. The reaſon is, becauſe none but a court of equity can decree that. The King in council is the proper judge of the original right; and if the agreement was fairly entered into and ſigned, the King in council might look on that, and allow it as evidence of the original right: but if that agreement is diſputed, it is impoſſible for the King in council to decree it as an agreement.

Marches in *Wales.*

ment. That court cannot decree *in perſonam* in *England* unleſs in certain criminal matters; being reſtrained therefrom by ſtat. 16 *Car.* and therefore the Lords of the council have remitted this matter very properly to be determined in another place on the foot of the contract. The conſcience of the party was bound by this agreement; and being within the juriſdiction of this court, (b) which acts *in perſonam*, the court may properly decree it as an agreement, if a foundation for it. To go a ſtep farther: as this court collaterally and in conſequence of the agreement judges concerning matters not originally in the juriſdiction, it would decree a performance of articles of agreement to perform a ſentence in the Eccleſiaſtical court, juſt as a court of law would maintain an action for damages in breach of covenant.

K. in council cannot decree an agreement not acting *in perſonam*, as this court can.

As to the ſecond objection: if it was ſo, it would be very unfortunate; for ſuits and controverſies might be for that reaſon endleſs; and this has ſubſiſted above ſeventy years. This objection is inſiſted on at the bar, and not by the anſwer. The ſubordinate proprietors may agree, how they will hold their rights between themſelves: and if a proper ſuit is before the King in council on the original right of theſe boundaries, the proprietors might proceed therein without making any other parties except themſelves. In this reſpect alſo it is properly compared to the caſe of *Lordſhips Marchers* and to counties *Palatine*. When the *Marches* ſubſiſted, there might be a ſuit in *B. R.* concerning their boundaries; and the Lord of each *March* in queſtion need be the only party. If a matter of equity aroſe, either of the *Lordſhips Marches* might have ſued in equity to ſettle, becauſe this is the King's court of general juriſdiction as to matters of equity; and an agreement between the parties relative to theſe boundaries, if proper in other reſpects to carry it into a ſpecific performance, is a matter of equity. The court might indeed by reaſon of their tenure require the *Attorney General* to be made a party, to know, if he had any thing to object; but then might hold plea of the cauſe. Suppoſe, both counties *Palatine* were in ſubjects hands (as both have been formerly), and ſubſiſted ſo; and a queſtion had ariſen concerning the boundaries of theſe two counties *Palatine*; and the reſpective Earls *Palatine* had entered into articles concerning theſe boundaries: this court would have held plea of ſuch articles as well as concerning the boundaries of manors, ſeigniories,

Proprietors of theſe gogernments may ſettle bounds between themſelves.

As in the *Marches* and counties *Palatine*.

(b) 4 Inſt. 213. Ante, 204. Poſt. 255.

seigniories, and honours; for these are honours, only a franchise of a higher nature. To say that such a settlement of boundaries amounts to an alienation, is not the true idea of it; for if fairly made, without collusion, (which cannot be presumed) the boundaries so settled are to be presumed to be the true and ancient limits. But suppose it savours in some degree of an alienation, why ought it not to be? There is no occasion to determine that, nor will I; but it is a new notion, that the Lords proprietors of these provinces may not alien to natural born subjects. This is no opinion: but the grants themselves are framed so as to be most open to alienation; being grants to them and their heirs to be held in common *socage*; not in *capite* of the crown, but as *Windsor Castle* is. What rule of law is there, that lands or a franchise granted to be held in common *socage*, not in *capite*, but as of a particular honour or manor, cannot be aliened without licence? All the objections concerning *knight's service* or *capite* lands are out of the case, and the act 7 and 8 *Will.* 3. *Cap.* 22. *Sect.* 16. supposes, the proprietors may alien to a natural born subject. The first words of the clause there are, that they and their assigns may be restrained from alienating without licence, which supposes that it was assigned; and this appears in the case of *Carolina*. As to the not alienating a parcel, the rule cited out of the *Feudists* is not applicable; those books treating of different tenures: but I admit, neither of these proprietors could dismember their provinces, so as to alter the nature of the thing granted, and thereby bind the crown, of whom they held; for the tenure and services would still remain on the whole, and the crown might demand the whole services from either It is therefore something like the case of the office of high constable of *England*, held by tenure of *grand serjeanty*; which was very extraordinary, to hold the manors by tenure of such an office. In *Kil.* 170, and *Dy.* 285, the judges reported their opinion to *K. H.* 8, that the tenure was not extinct by the division, but that the King had a right to insist on the performance of that office from the Duke of *Buckingham* by reason of his moiety: but this exacting the performance of the service from either subject is at the king's pleasure to do or not. This is an instance that in honours and tenures of this kind, the king cannot be prejudiced by any alienation, division or severance between the parties; and if material services are reserved on the grant (though here it is by fealty only in lieu of all) the entire services might be exacted from either, not being apportionable. But the settling limits is not a dismembering;

Which is not an alienation.

They may alien to subjects.

If part aliened the tenure and services would remain on the whole, and exacted from either.

(449)

Like office of high constable.

1 Inst 106. 249, 165.

ing; and if a licence to do this was neceſſary from the crown in law and policy, it ſufficiently appears, there was ſuch; for it appears by orders of council made in 1685 and 1709, the crown has not only recommended, but ordered, this diviſion to be made ſo far as reſpects the three lower counties; as to which there is no diſmembering; for the dividing line is thereby exactly the ſame: indeed the circle is not within theſe orders: but as to that no difficulty can ariſe.

Tenure of the planters preſerved by the agreement; they need not be parties.

As to the third objection: the tenure of the planters, *&c.* remain juſt the ſame as before, and is preſerved by this agreement. The proprietors could not prejudice them by their agreement; but if they could, care is taken by the agreement to preſerve them. The King of *England* is ſtill their ſovereign and ſupreme Lord; both charters require, the law of the reſpective provinces ſhould be conformable to the law of *England*, as near as could be. Conſider, to what this objection goes; in lower inſtances, in the caſe of manors and honours in *England*, which have different cuſtoms and by-laws frequently: yet though different, the boundaries of theſe manors may be ſettled in ſuits between the lords of theſe manors without making the tenants parties; or may be ſettled by agreement, which this court will decree without making the tenants parties: though in caſe of fraud, colluſion or prejudice to the tenants, they will not be bound: but notwithſtanding it is binding on the parties, and to be eſtabliſhed as to them. Suppoſe, two bordering manors had been granted out in (450) tail in recompence of ſervices, the reverſion in fee to the crown: in a ſuit between the lords concerning the boundaries, it is not neceſſary to make the king or tenants parties to this ſuit. Indeed the crown would not be bound by that agreement or decree: but it is ſtill binding between the parties. But in this caſe the ſame final anſwer occurs, that does under the other objection; *viz.* that if there is no fraud or colluſion, it muſt be preſumed to be the true limits being made between parties in an adverſary intereſt; each concerned to preſerve his own limits, and no pecuniary or other compenſation pretended. And (abſtracted from the general queſtion of want of juriſdiction) ſuppoſe, either party inſiſted, there was ſuch a breach of the *Proviſo* here, as incurred the penalty, and brought *Debt* in *B. R.* for that penalty, and the defendant there brought a bill here to be relieved (which probably would have been done:) the court muſt have relieved againſt the penalty on performance of the articles; judging on the terms of the re-

lief, and diſpenſing with the point of time, the court could not have avoided it. Then how does this caſe differ? For it will not be pretended, the King in council would have had plea in that caſe: it muſt have come into the King's courts of equity, which muſt have judged of the manner of performing that agreement.

The next head of objection is taken from the general nature and circumſtances of the agreement.

Agreements not decreed without conſideration.

Settling bounds a mutual conſideration.

Firſt it is true, the court never decrees ſpecifically without a conſideration: but this is not without conſideration; for though nothing valuable is given on the face of the articles as a conſideration, the ſettling boundaries, and peace and quiet, is a mutual conſideration on each ſide; and in all caſes make a conſideration to ſupport a ſuit in this court for performance of the agreement for ſettling the boundaries.

Lapſe of time in agreements relieved.

The objection of the time for performance being lapſed may be anſwered; for it is the buſineſs of this court to relieve againſt lapſe of time in performance of an agreement; and eſpecially where the non-performance has not ariſen by default of the party ſeeking to have a ſpecific performance; as it plainly does not here.

This agreement not like an award.

Next, theſe articles are not like ſubmiſſion to arbitration. In thoſe caſes generally the time is conditional, ſo as determination be made by ſuch a day; here the line and circle are agreed on by diſtinct, independent, covenants, and that they ſhall form the boundaries of theſe tracts of land: this therefore is a particular, certain, ſpecific contract of the parties, that theſe ſhall be the boundaries; nothing left to the judgment of the commiſſioners, who are merely miniſterial to run the line, &c. according to the agreement, and ſet the marks. Therefore it is not like an award, but is an agreement, which this court will ſee purſued.

(451)

No fraud or ſurpriſe.

As to any impoſition or ſurpriſe, the evidence is clearly contrary thereto. It would be unneceſſary to enter into the particulars of that evidence; but it appears, the agreement was originally propoſed by defendant himſelf: he himſelf produced the map or plan afterward annexed to the articles: (c) he himſelf reduced the heads of it into writing,

(c) Ante 19. 2 Vol. 46, 284.

writing, and was very well aſſiſted in making it: and farther that there was a great length of time taken for conſideration and reducing it to form. But there is ſomething greatly ſupporting this evidence, *viz.* the defect of evidence on the part of the defendant, which amounts to ſtronger negative evidence, than if it was by witneſſes; for it was in his own power to have ſhewn it, if otherwiſe. Then am I to preſume, he was impoſed on, in a plan too ſent to himſelf by his own agents: as to the plan itſelf, it was in his own power; with regard to the original of theſe minutes of the agreement wrote by himſelf, though ordered by the court to be produced, they are not produced; which negative evidence ſupports the evidence of the fairneſs of carrying on this agreement on the part of the plaintiffs.

I admit, that, though no impoſition or fraud, yet a plain miſtake contrary to the intent would be a ground not to decree ſpecific performance. But conſider the evidence thereof: the defendant and his anceſtors were converſant in this diſpute about 50 years, before this agreement was entered into, and had all opportunities; therefore no ignorance, want of information of miſtake, are to be preſumed: and in caſes of this kind after an agreement, and plain miſtake contrary to intent of parties not ſhewn, it is not neceſſary for the court to reſort to the original right of the parties: it is ſufficient, if doubtful. To conſider the points in diſpute, and firſt upon the defendant's charter; in which it is inſiſted, the whole 40th degree of *North* latitude is included; and if ſo, that it is not to be limited by any recital in the preamble. There is great foundation to ſay, the computations of latitude at the time of the grant, vary much from what they are at preſent; and that they were ſet much lower anciently, than what they are now; as appears by Mr. *Smith*'s book, which is of reputation: but I do not rely on that; for the fact is certainly ſo. But whatever that was, does it take it in by the deſcription? It comes to the queſtion, whether the *uſque ad* is incluſive or excluſive; therefore however deſcribed, the ſame queſtion remains. But there is another argument uſed by the plaintiffs to reſtrain the defendant's charter from taking in the whole 40th degree, *viz.* the recital of it, for the plaintiffs ſay, the information, given to the crown by Lord *Baltimore*, was, that this part was land uncultivated and poſſeſſed by barbarians: whereas it was not ſo, but poſſeſſed by *Dutch* and *Sweaes*; and therefore the King was deceived in his grant. There is conſiderable

Nor miſtake.

Not neceſſary to reſort to the original rights.

Former computations of latitude vary from the preſent.

The King deceived in his grant.

(452) evidence, that *Dutch* and *Swedes* were ſettled on the *Eaſt* part of that country; but this is ſaid to be no deceit on the crown; for though ſome ſtragglers were ſettled there, yet if not recogniſed by the crown, that is not a ſettlement. I am of a different opinion; for in theſe countries it has been always taken, that that *European* country, which has firſt ſet up marks of poſſeſſion, has gained the right, though not formed into a regular colony; and that is very reaſonable on the arguments on which they proceeded. Then will not that affect the grant? If the fact was ſo, that would be as great deceit on the crown in notion of law, as any other matter ariſing from the information of the party; becauſe ſuch grants tend to involve this crown in wars and diſputes with other nations: nor can there be a greater deceit than a miſrepreſentation tending to ſuch a conſequence; which would be a ground to repeal the letters patent by *ſcire facias*. Next conſider the diſpute on *Penn*'s charter, which grants to him all that track of land in *America* from twelve miles diſtance from *Newcaſtle*, to the 43d degree of *North* latitude, *&c.* under which the plaintiffs do not pretend a title to the three lower counties, which relate to the two feoffments in 1682. Upon the charter it is clear by the proof, that the true ſituation of *Cape Henlopen* is as it is marked in the plan, and not where *Cape Cornelius* is as the defendant inſiſts; which would leave out great part of what was intended to be included in the grant; and there is ſtrong evidence of ſeiſin and poſſeſſion by *Penn* of that ſpot of *Cape Henlopen*, and all acts of ownerſhip. But the reſult of all the evidence, taking it in the moſt favourable light for the defendant, amounts to make the boundaries of theſe countries and rights of the parties doubtful. *Senex* who was a good geographer ſays, that the degrees of latitude cannot be computed with the exactneſs of two or three miles: and another geographer ſays, that with the beſt inſtruments it is impoſſible to fix the degrees of latitude without the uncertainty of ſeventeen miles; which is near the whole extent between the two capes. It is therefore doubtful; and the moſt proper caſe for an agreement, which being entered into, the parties could not reſort back to the original rights between them; for if ſo, no agreements can ſtand: whereas an agreement, entered into fairly and without ſurpriſe, ought to be encouraged by a court of juſtice.

As to uncertainty of the agreement.

The objection of uncertainty ariſes principally on the queſtion concerning the circle of twelve miles to be drawn about *Newcaſtle*, it was inſiſted on in the anſwer, and greatly

greatly relied on in *America*; but is the cleareſt part of the cauſe. As to the center, it is ſaid, that *Newcaſtle* is a long town, and therefore it not being fixed by the articles, it is impoſſible that the court can decree it; but there is no difficulty in it: the center of a circle muſt be a mathematical point (otherwiſe it is indefinite) and no town can be ſo. I take all theſe ſort of expreſſions and ſuch agreements to imply a negative; to be a circle at ſuch a diſtance from *Newcaſtle*, and in no part to be farther. Then it muſt be no farther diſtant from any part of *Newcaſtle*. Thus to fix a center, the middle of *Newcaſtle*, as near as can be computed muſt be found; and a circle deſcribed round that town; which is the faireſt way; for otherwiſe, it might be fourteen miles in ſome parts of it, if it is a long town. Then what muſt be the extent of the circle? It is given up at the bar, though not in the anſwer. It cannot be twelve miles diſtant from *Newcaſtle* unleſs it has a ſemidiameter of twelve miles: but there is one argument deciſive without entering into nice mathematical queſtions: the line to be the dividing line, and to be drawn *North* from *Henlopin*, was either to be a tangent or interſecting from that circle, and if the *Radius* was to be of two miles only it would neither touch or interſect it, but go wide. There is no difference as to the place or running of the line from *South to North*, though there is as the cape, from which it is to commence.

(453)

As to the ſeventh head of this objection, it is truly ſaid, that agreements muſt be decreed entire, or not at all. As to the plaintiffs eſtate and poſſeſſion, this muſt concern only the three lower counties, which plainly paſſed by the feoffment. I will lay aſide the queſtion of *Eſtoppel*; which is a nice conſideration; for the Duke of *York*, being then in nature of a common perſon, was in a condition to be eſtopped by a proper inſtrument. In 1683 the Duke of *York* takes a new grant from the crown; and, having granted before, was bound to make further aſſurance, for the improvements made by *Penn* were a foundation to ſupport a bill in equity for further aſſurance. The Duke of *York* therefore while a ſubject was to be conſidered as a truſtee; why not afterward as a royal truſtee? I will not decree that in this court: nor is it neceſſary: but it is a notion eſtabliſhed in courts of revenue by modern deciſions, that the King may be a royal truſtee; and if the perſon, from whom the King takes by deſcent, was a truſtee, there may be grounds in equity to ſupport that; and if King *J.* 2. after coming to the crown was a royal truſtee,

The title to convey. Agreements to be decreed entirely. Eſtoppel.

The King a royal truſtee.

truſtee, his ſucceſſors take the legal eſtate under the ſame equity; and it is ſufficient for plaintiffs if they have an equitable eſtate. Then conſider this in point of poſſeſſion of the *Penns*; the proof of which is very clear: they have been permitted to appoint governors of theſe lower counties; which have been approved by the crown according to the ſtatute of King *William*. Indeed all the acts of poſſeſſion are with *ſalvo jure* to the crown; but the evidence for defendants amounts to this: not of a real poſſeſſion or enjoyment, but of attempts to take poſſeſſion ſometimes by force, ſometimes by inciting people to come there; otherwiſe why ſhould Lord *Baltimore* grant here, for half what he granted in other places? which ſhews plainly it was an invitation to get ſettlers there under their title. Now I am of opinion, that full and actual poſſeſſion is ſufficient title to maintain a ſuit for ſettling boundaries: a ſtrict title is never entered into in caſes of this kind; neither ought it. But what ends this point of want of title to convey is, that no part of the lower counties is left to be conveyed by plaintiffs to defendant; ſo that nothing being to paſs by plaintiffs it is not material whether they have title to convey or not. But now in caſes of this kind, of two great territories held of the crown, I will ſay once for all, that long poſſeſſion and enjoyment, peopling and cultivating countries, is one of the beſt evidence of title to lands, or diſtrict of lands in *America*, that can be; and ſo have I thought in all caſes ſince I have ſerved the crown; for the great beneficial advantages, ariſing to the crown from ſettling, *&c.* is, that the navigation and the commerce of this country is thereby improved. Thoſe perſons therefore, who make theſe ſettlements, ought to be protected in the poſſeſſion, as far as law and equity can: and both theſe proprietors appear to have great merit with regard to the crown and the public; for theſe two provinces have been improved in private families to a great degree to the advantage of their mother country: this regards the three lower countries; the ſtrength of which is vaſtly on the ſide of the plaintiffs.

Poſſeſſion ſufficient in a ſuit to ſettle bounds.

(454)

As to the court's not inforcing the execution of their judgment; if they could not at all, I agree, it would be in vain to make a decree; and that the court cannot inforce their own decree *in rem*, in the preſent caſe: but that is not an objection againſt making a decree in the cauſe; for the ſtrict primary decree in this court as a court of equity is (d) *in perſonam*, long before it was ſettled, whether this court

Agrement decreed, though it could not be inforced *in rem*.

(d) 4th Inſt. 213. Ante, 204, 447.

court could iſſue to put into poſſeſſion in a ſuit of lands in *England*; which was firſt begun and ſettled in the time of *James* I. but ever ſince done by injunction or writ of *aſſiſtant* to the ſheriff: but the court cannot to this day as to lands in *Ireland* or the plantations. In Lord *King*'s time in the caſe of *Richardſon* v. *Hamilton*, *Attorney General* of *Pennſylvania*, which was a ſuit of land and a houſe in the town of *Philadelphia*, the court made a decree, though it could not be inforced *in rem*. In the caſe of Lord *Angleſey* of land lying in *Ireland*, I decreed for diſtinguiſhing and ſettling the parts of the eſtate, though impoſſible to inforce that decree *in rem*, but the party being in *England*, I could inforce it by proceſs of contempt *in perſonam* and ſequeſtration, which is the proper juriſdiction of this court. And indeed in the preſent caſe, if the parties want more to be done, they muſt reſort to another juriſdiction; and it looks by the order in 1735, as if that was in view; liberty being thereby given to reſort to that board.

The primary decree in equity *in perſonam*.

This opens a way to that part of the caſe relating to the crown. The *Attorney General* acts a very impartial part; and I ſhall expreſs in the fulleſt words, that this decree is entirely without prejudice to any prerogative, right, or intereſt in the crown. I will go farther; that, as I do not know how far that intereſt of the crown may be, I will reſerve liberty for either party to apply to this court, if by any act or right of the crown, execution of this ſhall be obſtructed; for the court is at liberty to ſuſpend its decree, if a difficulty to perform it is ſhewn: and I will reſerve further directions as between the parties as to that matter ſo *de novo* ariſing. Judgments have been at law with a *ſalvo jure* of the crown; as in *Raſtal* and *Coke*'s entries in the title of *intruſion* and *quo Warranto*; which particularly in the caſes of lands relating to intruſion, is very analogous to the preſent.

Salvo Jure to the crown.

(455)

Liberty to ſuſpend the decree.

I am of opinion therefore to decree a ſpecific performance of this agreement without prejudice to any right, *&c.* of the crown.

Next as to the point of coſts: for which muſt be conſidered, what paſſed in *America* and in *England*. As to what paſſed antecedent to granting the commiſſion, it is very fair on both ſides; all the objection, ariſing from that, is the defence againſt the performance; and that there are no grounds for the defence from fraud, impoſition or miſtake, which are made the heads for it. But in

Coſts againſt defendant.

in *America* the defendant's commiſſioners behaved with great chicane in the point they inſiſted on, as the want of a center of a circle, and the extent of that circle, *viz.* whether a diameter of two or of twelve miles: the endeavouring to take advantage of one of plaintiffs commiſſioners coming too late, to make the plaintiffs incur the penalty. It is plain, from the articles, both ſides ſhould be anſwerable for default of their commiſſioners: the penalty ſhews the intent; though I own, this is not that caſe; but I do not go on that. The defendant has been miſled by his commiſſioners and agents in *America*, to make their objections his defence; which brings it nearer to himſelf; and though he would not at all have thought of it as from himſelf (ſo that I impute nothing in the leaſt diſhonourable to him), yet I muſt take it as his own act; and then ſhould not do complete juſtice, if I did not give plaintiffs the coſts of this ſuit to this time, to be taxed, reſerving ſubſequent coſts.

His Lordſhip, having directed that the plaintiffs and defendant ſhould quietly hold according to the articles, altered that, for it would be improper to have a decree in this court for quiet enjoyment of lands in *America*; which would occaſion continual applications to this court for contempts, *&c.* and that it ought to be the proper juriſdiction.

Mr. *Solicitor General* in his argument cited the *Maſſachuſſet Bay* company, againſt the *King*, in 1746, in the council, as to ſettling boundaries; where on petition by the plaintiffs to rehear, the committee reported, that there was no inſtance of rehearing on an appeal; which would
(456) be miſchievous, unleſs on ſome very particular circumſtances, as new diſcovery or fraud concealed; and therefore the petition was rejected.

Caſe 190. Weſt *verſus* Skip, *May* 16, 1750.

Ante, 239. May 1749. THIS now came on upon the point reſerved till after the determination of *Ryal* v. *Rowles*: *Ante* 27 *January* 1749-50, and the queſtion was, whether there was any diſtinction between this and that caſe either on the foot of the *Elegit*, taken out by the ſiſters of *Ralph Harwood* on a judgment confeſſed by him, againſt his leaſe of the

the brewhouſe, &c. (which the ſiſters inſiſted, the commiſſioners of the bankrupt were not intitled to ſeiſe and ſell under the act of parliament,) or on the foot of the officers of exciſe, whom the ſiſters had paid off, and inſiſted, that having paid a debt to the crown, the prerogative of the crown ſhould avail them.

LORD CHANCELLOR.

The ſtatutes of bankruptcy do certainly not extend to the right of the crown; but as to the partnerſhip-debts ſubſequent to the aſſignment, the ſiſters are conſidered as partners; and the partnerſhip-effects muſt be applied to pay the partnerſhip-debts, before any other partner can claim any thing out of either for his ſhare or debt. Suppoſe, a ſubſequent judgment-creditor has taken theſe effects in execution: it has been determined over and over at *Guildhall*, that one cannot come againſt theſe goods, which he had left in the bankrupt's hands, and ſay, he is a prior judgment-creditor. Then a queſtion will be, whether any thing will be coming after payment of the partnerſhip-debts?

Partnerſhip effects firſt applied to pay partnerſhip debts.

Judgment creditor leaving the goods in bankrupt's hands, cannot come againſt another, who has taken execution.

But firſt let the Maſter inquire, whether, at the time of the judgment confeſſed by *Ralph Harwood* to his ſiſters, any ſum was due to them, or either of them? what was the conſideration of the judgment: and if the maſter ſhall find any debt due, then take an account thereof.

Baker *verſus* Paine, *May* 21, 1750. Caſe 191.

THE plaintiff captain of an *India Ship*, (e) by articles of agreement bargained and ſold to defendant, all his *China* ware and merchandiſe, which he brought home in his laſt voyage; covenanting that he was the real proprietor, and had a right to ſell, and ſhould allow, deduct or pay to defendant, all the cuſtoms, duties, allowances and charges, that ſhould be taken out of the ſaid bargained premiſſes. Thoſe allowances amounted in the whole to forty-ſix and a half *per cent.* paid to the company on the captain's private trade in reſpect of warehouſe-room, &c. or of the duties to the crown. Two ſhips having been taken on return home, the goods happened to ſell for a much higher price

Articles of agreement rectified by the minutes.

(e) Ante 317.

price than they had agreed on. The captain brought this bill, for an account of what was due on this contract.

The material queſtion was, whether the plaintiff ought to bear all deductions and allowances, that were to be made, to the extent only of that ſum he was to receive on his private contract with defendant; or whether he was to bear it on the whole price, the goods ſhould ſell for at the company's ſale by inch of candle?

Plaintiff's counſel admitted, the articles, as penned, were againſt him ſo as to oblige him to pay on the whole ſum, but the real contract and intent was, that he ſhould pay the forty-ſix and a half *per cent.* only on the price, he was to receive by his private contract with defendant who ſhould bear the deduction on the ſurplus price, for which the goods ſold, becauſe that was all profit to himſelf; and it appeared by the minutes and the calculations made by themſelves at the time, that this was contrary to the intent, and a miſtake by the drawer: which is a head of relief in this court: and to this parol evidence was offered to be read.

Objected to for defendant; for by this means the mere allegation of miſtake will let in parol evidence in contradiction to any agreement, and defeat written acts. The preſumption is, the whole agreement was compriſed in that deed; therefore though the court leans againſt objections of this kind, which prevent information, yet this would contradict the rule of evidence, always adhered to unleſs there is fraud in the deed. The court will not add to the written agreement. In a caſe, *Mich.* 1746, on an agreement about a leaſe, which the defendant agreed to let at ſo much clear of taxes: the defendant was an unlettered perſon who added his mark; the tenant drew it, but omitted to inſert that clauſe, and brought a bill to carry it into execution: the defendant proved, that it was the intent it ſhould be clear of taxes; but the court ſaid, that if the bill had been brought by the defendant to carry into execution, the objection would be more material, as that would be to add to the agreement.

LORD CHANCELLOR

How can a miſtake in an agreement, be proved but by parol evidence? (f) It is not read to contradict the face of the agreement which the court would not allow, but to prove a miſtake therein, which cannot otherwiſe be proved: it may therefore be read.

Parol evidence to prove miſtake in agreement.

For Plaintiff. It was then urged, that by ſuch an agreement as this, the more his goods ſold for, the leſs he ſhould receive; nay they might ſell at ſo high a price that he ſhould be money out of pocket; and parol evidence was read to ſhew the uſage; *viz.* that the buyer uſually paid all the charges on the ſurplus price, above what was contracted for. The defendant bid for the goods himſelf, and nodded to the auctioneer; and ſince offered plaintiff money by way of compromiſe.

(458)

For Defendant. Though by this agreement the more plaintiff's goods ſold for, the leſs he would receive, he could not be out of pocket; for though the word *pay* was inſerted in the articles, (which would indeed be a foundation for an action of covenant to compel payment of the whole deductions) it was by miſtake of the drawer, for in the minutes it was only *deduct*, and equity would relieve. But this is a contract on a riſk or chance on both parties; and its having fallen out in favour of defendant is no reaſon to vary the agreement, which muſt be taken as at the time, unleſs fraud appears. If in all contingent contracts the riſk muſt be equal, it would bring more buſineſs than the court could know what to do with: had a ſmall advantage been gained, it would not be ſet aſide, and the *quantum* will not vary it. Suppoſe a ſhip, inſured at a great price is miſſing, had never ſailed, but was ſafe in port all the time, ſo that the underwriter ran little riſk: yet on a bill to have the *præmium* returned on foot of miſtake the court would not relieve. No fraud is proved: and little weight is to be laid on the offers to plaintiff.

LORD

(f) Parol evidence admitted to prove words taken down in writing were contrary to the concurrent intention of all parties. 1 Brown, 341.

Where the agreement was not inſerted in the deed as the tranſaction would appear uſurious; Parol evidence of this referred to contradict the deed, as the agreement was not charged to have been omitted by fraud. 1 Brown, 92.

LORD CHANCELLOR.

It is impoſſible to ſay, this caſe is free from obſcurity; and every caſe of this kind will be attended with ſome. Plaintiff may be intitled to a decree for account; but it muſt be according to what was his real ageeement. To be ſure it is very extraordinary, that an agreement ſhould be made for ſale of goods, which goods muſt by law be ſold at another public ſale to aſcertain the real price; and that the more the goods ſold for, and the greater profit the buyer ſhould make, the leſs the ſeller ſhould receive for thoſe goods. Such an agreement might indeed be made; but it is extraordinary; though it is not likely to happen, yet poſſibly the goods might ſell ſo high, that the ſeller might be obliged to pay money out of his pocket beſides loſing the whole price of the goods. It is admitted, there is a miſtake, by drawing it ſo as that an action of covenant would lie; and then the queſtion is, whether equity would relieve? But I do not think the drawer of the articles has purſued the intent of the minutes in other parts beſides the inſerting the word *pay*. In the minutes it is not ſaid, *that all ſhall be charged on the bargained premiſſes*, (459) which imports the good ſold, but *charges, &c. that may be taken out of the produce of the ſaid china ware*; which is an ambiguous expreſſion, not ſo determinate as the other; as it might refer to the account the parties made up themſelves, which was to be regulated *de novo*; and this is a great variation in the words and ſenſe. Then I am of opinion, theſe minutes muſt be taken to be the agreement of the parties; and if any material variation (as is admitted for defendant) the articles muſt be rectified. The queſtion then is, what is the true ſenſe of the minutes?

Contracts expounded by uſage of trade.

All contracts of this kind depend on the uſage of trade, and are ſo allowed, not only in this but in common law courts. On mercantile contracts relating to inſurances, *&c.* courts of law examine and hear witneſſes, of what is the uſage and underſtanding of merchants converſant therein; for they have a ſtile peculiar to themſelves, which is ſhort, yet is underſtood by them; and muſt be the rule of conſtruction. The material evidence to afford a rule from facts and uſage would be to ſhew how the accounts had been made up, and the allowance made by the captain on one ſide, and the buyer or dealer in *china* on the other. And the plaintiff has proved by ſeveral witneſſes; the amount of which is, that ſuppoſe the captain previous to

the

the ſale, agrees to ſell part of his private trade for 100*l.* on which all the charges amount to 50*l.* the ſeller is to pay that 50*l.* but if the ſale ſhould amount to 200*l.* the buyer uſually pays the advance: whereas the evidence on the part of defendant amounts to nothing in this caſe, not ſwearing to a queſtion of fact, what allowances, or in what manner accounts are made up (which is material) but only to the form and expreſſion of the contract.

Contracts on riſk, taken as at time of agreement.

As to the objection of the riſk; it is truly ſaid, in all contracts of riſk, that is no reaſon to vary or put a different conſtruction on the agreement; which muſt be taken at the time: but here that argument is not *ad idem*; for the riſk in this caſe is not at all to be applied to the deductions or allowances; which was a known and certain charge of 46 and a half *per cent.*

Offers of compromiſe, where material.

As to the ſubſequent miſbehaviour of defendant, no intentional fraud is to be inferred; but it is ſufficient for this purpoſe, that to make another conſtruction would put it in the buyer's power to play ſuch tricks; and it is not material to inquire, whether it was done or not. The offers by defendant are material, though generally ſpeaking, offers by the parties by way of compromiſe are not to have much weight in the merits of the caſe, nor to be made uſe of, yet in caſes of this kind, where the contract is doubtfully penned and to be explained by uſage, thoſe offers may have weight. But as to the riſk of the two ſhips being taken, that, I ſuppoſe was a riſk not conſidered by any party.

The minutes muſt be taken to be the agreement; the articles are not penned agreeable thereto; therefore the minutes ought to be expounded according to the uſage of trade; which is proved to be, as plaintiff inſiſts, defendant's evidence proving nothing of the fact.

Caſe 192. Rook *verſus* Warth, *May* 23, 1750.

Copyhold tenement intailed being burnt, a collection in briefs to rebuild is paid to guardian of tenant in tail, who dies under age without being ſo applied; Claimants under intail intitled to the money, not perſonal repreſentative.

A Copyhold eſtate intailed, conſiſting principally of a houſe, having been burnt down, the ſum of 96*l.* was collected on briefs toward the rebuilding, and paid by the truſtees of the charity into the hands of the guardian of tenant in tail who was an infant, and died under age, without its having been ſo applied. A queſtion aroſe between the perſonal repreſentative of the infant and his aunts, who claimed as iſſue in tail under the ſettlement of the real eſtate, in place of which this money came, and brought this bill for that purpoſe.

LORD CHANCELLOR.

This is certainly a new caſe; of which there is no precedent; yet in general there are authorities, the reaſon of which governs this.

I was at firſt a little alarmed by this bill; becauſe what I generally go on, is to diſcharge bills relating to money given in this kind of charity collected on briefs; and if the money had been in the hands of the truſtees, I would have diſmiſſed the bill; and they ſhould have come to this court by petition; but that is not the caſe, the money having been paid by the truſtees, for the benefit of the perſon then taken to be the ſufferer: ſo that it is in the hands of his guardian, and in the ſame ſtate as if a particular ſum had been raiſed or given by relations or friends of the infant, and to come in lieu of that loſs he ſuſtained, and which would be ſo applied. It is admitted, the only loſs ſuſtained by the infant was from the burning down the houſe: had it been a loſs complicated, partly conſiſting in the burning the houſe and deſtroying the goods and other property of the infant, it would have been very difficult to have made a diviſion and diſtribution of the money: and I ſhould have endeavoured to have avoided entering into that conſideration: but that is not the caſe.

There are two principal grounds for plaintiffs: *viz.* that this was an eſtate tail of one dying during infancy; and that it was copyhold.

(461) As to the firſt, ſuppoſing this had been the eſtate of one of full age ſeiſed in fee; and the money had been paid by the

the truſtees to tenant in fee himſelf, or to ſome one for his benefit: I ſhould be of opinion, that on his death his heir at law could have no claim on that money; unleſs there was ſome act, declaration, or apparent circumſtance, ariſing from himſelf to appropriate this money to rebuilding the houſe. So if he had been tenant in tail of full age who had ſpent or mixed the money with his other perſonal eſtate without appropriation to the purpoſe of rebuilding: I ſhould have thought the iſſue in tail would have had no right to come to this court to have it ſo applied. Therefore it is rightly compared to the caſe of money paid on inſurance of a houſe from fire: the inſurance-money was a ſatisfaction for the loſs; and if tenant in tail or in fee of full age had died, before the money was paid by the inſurance offices, the heir at law or iſſue in tail would have a conſiderable right to come into this court to have the premiſſes ſo deſtroyed, repaired or rebuilt, and that caſe of the inſurance might be compared to caſes, where tenant in fee enters into articles to build a houſe, and before it is built, the party dies: the court has decreed as between executor and heir at law the articles ſhould be carried into execution, and the houſe rebuilt for the benefit of the heir at law; it partaking of the nature of the realty. There may be caſes, where tenant in tail or fee has done an act, for which he had a perſonal remedy only, as againſt the workman he had contracted with; that ſhould be conſidered as ſo annexed to the realty, as that the heir at law ſhould have the benefit of the contract. There is a caſe for that purpoſe in *Ver.* ſo would it be in the caſe of one of full age. (g) But this is a caſe of infancy, which operates in this manner: he was under guardianſhip; (h) and his eſtate ought to be taken care of, and applied according to the nature of it; and the court will always take care it ſhall be ſo, and will not ſuffer his real property to be changed into perſonal during his infancy, or his perſonal into real; in order that the perſons, who are to come into ſucceſſion, may find the property in the ſame ſtate without being altered by thoſe, who had not power to alter it: of which there are ſeveral caſes with regard to the timber part of the inheritance, and with regard to money directed to be laid out in land, which the infant might have elected to be taken as money, if he lived to full age. Then on a bill in the infant's life by his *prochein amy* in his name, the court would have compelled the guardian or truſtee to have

2 *Ver.* 322.

Infant's property not to be changed.

(g) 3 Wms. 99. Prec. Chan. 319. 1 Atk. 480.
(h) Infants inheritance not bound by act of the court. 2 Vol. 23.

have laid this money out in rebuilding the houſe; and would not have ſaid, the money ſhould be kept till he dies, and then it ſhall be mere money, and the heir at law ſhall take the premiſſes without the application of the proper fund to put them in the condition they were. That right ſubſiſting during his whole life, his death will not change it; but it will be bound by the ſame equity, and under the ſame right.

(462) Copyhold tenant ſubject to waſte, unleſs by act of God.

Then conſider the next diſtinguiſhing reaſon, that this is copyhold; which greatly ſtrengthens it. The copyhold tenant being ſubject to *waſte* by the general rule of law, (no cuſtom to the contrary being ſhewn) this might have been conſidered by the lord of the manor as waſte; for, unleſs it is a burning by lightning or the act of God, the deſtruction of a houſe by fire, unleſs in convenient time repaired, is waſte. So as between landlord and tenant for years, though no covenant to repair or rebuild, he is ſubject to *waſte* in general, and if the houſe is burned by fire, he muſt rebuild. But this is ſtronger, for if there is any negligence in the copyhold tenant or guardian, as this is the caſe of an infant, the lord of the manor would have this right; which therefore ſtill ſubſiſts: and it would be fatal for the tenant in tail, if he ſhould loſe his eſtate for want of the application of this money. This diſtinguiſhes the preſent caſe; and if it had been a queſtion between the heir at law and perſonal repreſentative, the heir at law would have this right to have the money ſo applied, as it ſtood ſo bound at the death of the infant: ſo will the iſſue in tail.

And tenant for years, where burnt by fire, though no covenant to repair or rebuild.

The only doubt I have, is as to this part of the caſe: the whole of the loſs, the infant ſuſtained, is computed to 148*l.* the loſs to him during his minority, as then he could not alien, was the loſs of the profits of the eſtate, which muſt be conſidered as the loſs of the intereſt of that money, and a perſonal loſs to himſelf. Then will the iſſue in tail be intitled to have the whole laid out in rebuilding the premiſes? or ought not the infant tenant in tail to be allowed ſo much out of it, as the intereſt of the whole 148*l.* would amount to during his life? It was agreed afterward that the plaintiffs ſhould pay 80*l.* as a reaſonable proportion of the 96*l.* to the rebuilding under the circumſtances of the caſe: but without coſts on either ſide. As the plaintiffs were tenants in tail of full age, the court would not decree them to lay it out; they might do as they thought fit.

Green

Green *verſus* Rutherforth, *May* 23, 1750. Caſe 193.

Lord Hardwicke LORD CHANCELLOR, *Sir* John Strange, *Maſter of the Rolls.*

Deviſe of a rectory to a college on truſt (*inter alia*) to preſent the ſenior divine then fellow. Plea to juriſdiction, as being in the viſitor, over-ruled.

THE end of the bill againſt the Maſter, Fellows, and Scholars of St. *John*'s College in *Cambridge*, was to oblige Dr. *Rutherforth* to deliver up a preſentation made by the College of him to the rectory and pariſh church of *Barrow* in *Suffolk*, to reſtrain his having inſtitution and induction thereon, and to preſent the plaintiff under their common ſeal; ſetting forth, that *Margaret* Counteſs of *Richmond*, mother of King *Henry* 7th founded this College; that Queen *Elizabeth* in her 22d year gave a new body of ſtatutes to the College, which were accepted by them, and under which they have ever ſince been governed: that by uninterruped uſage of the College whenever a benefice became vacant, the ſenior Fellow on the divinity line was preſented, whether he had taken the degree or not: that Dr. *John Bowton*, a Fellow, by will in 1689 deviſed to the Maſter, Fellows and Scholars of the College and their ſucceſſors, the perpetual advowſon of this rectory on truſt, that whenever the church ſhould be void, and his nephew ſhould be capable to be preſented thereto, they ſhould preſent him; and on the next avoidance ſhould preſent one of his name and kindred, if there ſhould be any ſuch capable thereof in the College; if no ſuch, they ſhould preſent the ſenior divine then Fellow of the College: and on his refuſal, the next ſenior divine, and ſo downward; and if all refuſed, they ſhould preſent any other perſon they ſhould think fit: but that whatever Fellow accepted it, ſhould be obliged to reſign his fellowſhip and place in the College within one year. The laſt incumbent dying in *May* 1749, it was offered to the ſenior Fellow, and on his refuſal to the next, till it came to the plaintiff's turn, as next ſenior on the divinity line, who offered to take it, and they were deſired to preſent him: but the defendant inſiſted, that he, being doctor in divinity, was to be conſidered as the perſon deſcribed by teſtator, and interpoſed by appeal to the Biſhop of *Ely* as viſitor; on hearing which the Biſhop was of opinion, that Dr. *Rutherforth* was within the deſcription of the will, and therefore required them to preſent him; and that to avoid being cenſured, they made a ſpecial preſentation under their common ſeal: but the plaintiff in-

(463)

ſiſted, that as the advowſon was deviſed to the College under particular truſt by a third perſon, not the founder, the viſitor had not juriſdiction to determine of the preſentation, or to interpoſe in execution of the truſt; and therefore prays, that preſentation may be cancelled, and that the College may be directed to preſent him as intitled under the truſt of the will.

Dr. *Rutherforth* put in a plea to the juriſdiction of this court; in which he ſtates and ſets forth *verbatim* the will and ſtatutes; the firſt of which was *de ambiguis et obſcuris interpretandis*; wherein Queen *Elizabeth* reſerves a power of adding, diminiſhing, changing, and diſpoſing, inhibiting all others therefrom; and if the Biſhop of *Ely* or any other ſhould make new ſtatutes, ſhe abſolves the College from obeying them on pain of perury and amotion; and if any doubt ſhould ariſe on her ſtatutes, they ſhould ſend to the biſhop of *Ely*, and ſubmit to his deciſion on pain of amotion. The next ſtatute ſet out was *de viſitatore*: the next *de Collatione beneficiorum*, that on a vacancy of any benefice they ſhould within a month after confer the ſame
(464) *Socio ſecundum gradum ſuum maxime ſeniori qui nullum eccleſiaſticum beneficium habet.* After which defendant ſays farther, that he has heard and believes, the Biſhop of *Ely* for the time being, and no other, has been of right viſitor, and exerciſed all powers and juriſdiction over the Maſter, Fellows and Scholars of the College, and all other matters within the juriſdiction of a viſitor, in as ample a manner as may be lawfully exerciſed; and that he, and no other court, has determined controverſies about the conſtruction of the ſtatutes and right of preſentation, whether given by the original foundreſs or ſubſequent benefactor. He then ſet forth the will of Dr. *Bowton*, who had been long a Fellow and well acquainted with the ſtatutes; then ſtates the facts of his preſentation on his appeal; to which the Maſter, *&c.* had put in an anſwer; then avers, that the plaintiff never appealed to the viſitor to hear his right or claim: that the Biſhop has right to compel all the members to anſwer upon oath as to all matters touching preſentation of a living, and to inforce the proſecution of all the ſtatutes; and prays judgment, whether he ought to be compelled to anſwer plaintiff's bill, and whether this court ought to proceed farther in the ſaid ſuit.

For defendant. This is a plea in its nature to the juriſdiction of the court: that there is another judicature excluſively to take conuſance of matters of this kind, which has

has exerciſed its juriſdiction, and pronounced ſentence in this cauſe; which is binding. The the Biſhop of *Ely* is ſo appointed generally, appears by expreſs words of the ſtatutes, *viſitationem illi commendamus*; and then the particular directions ſubſequent will not take away that general viſitatorial power. It is a queſtion of great conſequence to both univerſities; affecting that power they in general are all ſubject to. As theſe eleemoſynary foundations are ſubject to rules and orders of their own, ſome perſon ought to be ſuperintendant to ſee their body of ſtatutes, which is their *magna charta*, maintained; and that is the viſitor; the reaſon of which is, that they might not be drawn from the College to *Weſtminſter*, but have a ſpeedy and final remedy. His power in general extends to matters relating to the College, its members or poſſeſſions; having ſolely a right to determine any controverſy about the fellowſhips, as Lord *Hale* has ſettled; and conſequently the incidents, as the emoluments, goods, and profits of the lands. Though an advowſon may be conſidered as a truſt, it would be fatal, if under that notion the courts at *Weſtminſter* ſhould draw advowſons of Colleges to them; and as the founder might ſubject that as well as lands or goods, it is a proper object of the viſitor and would certainly be ſo, if it belonged originally to the College: nor will its coming ſubſequent make it otherwiſe; the viſitor and founder having a right to put ſubſequent benefactions under the ſtatute or correction of the viſitor: otherwiſe it would be a great diſturbance to College poſſeſſions; for where one advowſon has come to a (465) College by original foundation, many more have come ſince; and all livings, given to a College or purchaſed ſubſequent to the firſt foundation, and by a private perſon, nay a bequeſt of goods or plate will thereby be excepted out of the viſitor's power: whereas they ſhould be conſidered part of the general property of the College, and reſt on the ſame rules: nor is there an inſtance of an application to any other court, unleſs in a collateral queſtion of donor's right to give. Being given as an emolument to a fellowſhip, no particular truſt can take it out of that juriſdiction, the Biſhop has over the perſon and the thing, and the ſtatute alone can determine, who is ſenior divine. There being various truſts in the will, in one of which the College is intereſted, it is no objection to the viſitor's power, that the reſt of the truſts are ſuch, as a court of juſtice would have conuſance of. The preceding truſts to the nephew, *&c.* are determined, and on a bill for eſtabliſhment of the charity muſt have been conſidered, as if they had never been in the will: ſo that over the intermediate truſt

among the members of the College the viſitor muſt have juriſdiction; like a gift to the College for a particular eſtate, remainder over; the College would have an uncertain duration of the property, but it would be no objection to the viſitor's juriſdiction, that a truſt may happen, in which a perſon, no member, may be intereſted; for in mean time it would be the ſame, as if no remainder. But in reality the ſubſequent part of the will creates no truſt at all; for there cannot be a truſt without a particular object; as if the deviſe had been to the College, to give to whom they pleaſe; for if they will not preſent any one, this court cannot compel them: whereas the viſitor may under the ſtatutes direct them to preſent: it has been held in this court, that new ingrafted Fellows may be ſubject to viſitor's juriſdiction: and ſo new donations may: which was the caſe of *Clare Hall* in *Cambridge*, *March* 21, 1747-8. *Attorney General at the relation of Mapletoft* v. *Talbot*. None but the viſitor can compel a Fellow to reſign at the end of a year, as the will requires. By the anſwer to the appeal the viſitor's right is ſubmitted to: by the canon law an *exprobratio judicis* ſhould have been entered to object to the viſitor's juriſdiction; and the court will not grant prohibition after ſentence.

Ante.

For plaintiff. The College, not caring to controvert with the Biſhop the right of viſitation, choſe to make the preſentation he recommended. The plaintiff then had no other remedy than in equity to compel an execution of the truſt, which was in the College; for no *mandamus* from a court of law could be for that purpoſe, nor remedy by *quare imp.* or action. Over charities at large without incorporation, the king's court has conuſance by the general law of the land adminiſtered there. Corporations for charities muſt be conſidered in two views; as a corporation, and as eleemoſynary: in the firſt they are mere creatures of the crown, who only can incorporate; they are capable to ſue and to be ſued, contract debts, and purchaſe, and are governed by the law of the land in the King's courts. In the laſt the conſequence is the founder, (he who firſt endows, endowment making the foundation whenever it happens, 10 *Co.* 33, it not being neceſſary that it ſhould precede, follow, or accompany), and his heirs have by law a power to direct in what manner his charity ſhall be enjoyed, and may give permanent ſtatutes, delegate this power to another abſolutely (which makes a general viſitor, in place of the founder) or ſpecially, giving up part of his power only, as to viſit the head, or judge of one queſtion only: the

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perſon

perſon in place of the founder has all his powers virtually, though not mentioned: the other has only that given him particularly, and he muſt ſhew it. Where the founder dies without heirs, the King's courts take conuſance of the charity: ſo where the founder appoints viſitors, who are intereſted themſelves in the queſtion; he having parted with his own power. *Duke's charitable uſes* 68, 69, 83, 4 *P. Wil.* 325, the caſe of *Birmingham School*, that they ſhould not judge in their own cauſe. The preſumption being, that the King's courts have juriſdiction, the party ſetting up a viſitor muſt ſhew preciſely, that he has excluſive authority; whether in return to *mandamus*, or plea in *prohibition*, or plea to a bill in this court to the juriſdiction, which muſt be as preciſe as the others; for this court has certainly juriſdiction, unleſs the contrary is neceſſarily ſhewn. This therefore is a caſe *ſtrictiſſimi Juris*, where nothing is preſumed; and being the ſingle juriſdiction in which there is no appeal, is to be leaned againſt by a ſuperior court; and often is complained of, becauſe property is arbitrarily put in power of a ſingle perſon. The only reaſon to be given for it is from the property, and the power every one has over that: for that reaſon patronage ariſes; to which viſitation is compared. This appears from what *Holt* ſays in *Philips* v. *Bury* in *Skin.* that donor's charity muſt be taken on his terms. None but the donor can make a viſitor; nor can the King make ſtatutes on a private foundation without the donor's conſent. In Dr. *Bland*'s caſe, *B. R. Mich.* 14 *G.* 2. the Chief Juſtice held, that the bare general ſuggeſtion of a viſitor would not preclude the juriſdiction of this court, but it ſhould appear certainly, that the viſitor could do juſtice in the cauſe. On the plea itſelf he does not ſtand generally in place of the founder; nor does it ſhew any ſpecial authority to judge of this queſtion. The plea ought to have averred, there were no other ſtatutes by Queen *Elizabeth* her predeceſſors or ſucceſſors; and the want of any averment will not be excuſed in ſupporr of ſuch a juriſdiction. *Holt* in *Philips* v. *Bury* allows, the viſitor's ſentence would be a nullity, if contrary to his power: and there was a general viſitor, only the mode preſcribed: here not. But allowing he is a general viſitor, and has conuſance over their own livings, it follows not, he has authority over this deviſe; for there is no caſe, that a new purchaſe to a corporation, originally eleemoſynary, ſhould be ſubject to the founder's firſt donation. The legal eſtate being in the founder's corporation will not give him that power; nor the uſes being among the members; for if a legacy is given to a ſenior Fellow, on a queſtion to whom

whom to be paid, this court would not refer to a viſitor to determine: nor will both together give it. Though a corporation cannot be ſeiſed to a uſe, it may to a truſt; there being ſeveral informations againſt corporations to execute them. It may be a truſt not only for the members, but for a third perſon; and there is no reaſon, why there ſhould be an implied intent in teſtator to give a power to viſit, only becauſe he gave it to the College. Reſignation within the year may be by the ordinary courſe of juſtice; for this court, though it might not decree ſurrender of the fellowſhip, would do the ſame thing, by ſaying he ſhall not enjoy it but upon complying with the will. This court can conſtrue the ſtatutes, when brought before the court to judge, who is ſenior divine. Inconvenience is not to change the law. Teſtator is the proper judge thereof: the caſe of *Clare Hall* differs; that was the ſame truſt carried throughout, though for different perſons; in caſe of the nephew, this court had juriſdiction, would have decreed the College to preſent him; and would then not have decreed in part only, but the future truſt.

The court, having taken time to conſider, now gave judgment.

Maſter of the Rolls. On the caſe, as it ſtands on the pleadings, muſt the opinion of the court be grounded; for nothing on either ſide, not contained in the pleadings, can be taken notice of. In the argument many things have been gone into as to viſitatorial power in general, and the particular conſtitution of the viſitor of this College, of which there is no occaſion to deliver an opinion. But I ſhall confine myſelf to the merits of the plea on the general queſtion whether to allow it or not; and on the beſt conſideration I am of opinion to over-rule this plea.

Exempted from viſitor's power by the truſt in the will.

Firſt to remove an argument much relied on for defendant on the head of inconvenience: that if this living falls not within the conuſance of the viſitor, all livings given or purchaſed ſubſequent to the firſt foundation of the College, and by a private perſon, and even a bequeſt of books, *&c.* will be exempted from the viſitor's power. In anſwer to which, this is not a purchaſe or general bequeſt of an advowſon to the College without any particular truſt annexed; for then, though it came after appointment of viſitor, and from a third perſon (not the founder) or by purchaſe, it would fall under the general regulations controuling all the other property of that nature, and be equally

equally the object of viſitatorial power, if the former were ſo: but this is circumſcribed by particular, expreſs truſt, inconſiſtent with the regulations, by which the other property is to be governed; and therefore proper for the juriſdiction of this court; ſtanding on ſpecial circumſtances peculiar to itſelf; the deciſion of which cannot have ſuch extenſive conſequences, as is objected. (468)

The merits of the controverſy depend on the conſtruction of the will, and execution of the particular truſts therein contained; both which are undeniably proper for the juriſdiction of this court. Though the will was made ſo long ago, yet it is neceſſary to take up the caſe, as it ſtands on the whole frame of the will and from the death of teſtator. It is not a general bequeſt of the living, like any other patron ſeized of an advowſon, but to particular intents and purpoſes ſpecified by the will. Defendant's counſel were forced to admit the words were ſufficient to create a truſt for the benefit of thoſe particularly provided for. At making the will the living was full: and therefore teſtator could only direct, what he would have done on the firſt vacancy. If on a vacancy the nephew, being capable, had offered to take it, and the College refuſed to preſent him, on his reſorting to a court of equity for an execution of that truſt, which was in them, the court would not have ſent him away without that remedy, which is the ordinary and natural juſtice. A private perſon would undoubtedly be compellable to execute it; and conſidered as a truſt, it makes no difference, who are the truſtees; the power of this court operating on them in capacity of truſtees: and though they are a collegiate body, whoſe founder has given a viſitor to ſuperintend his own foundation and bounty, yet, as between one claiming under a ſeparate benefactor and theſe truſtees for ſpecial purpoſes, the court will look on them as truſtees only, and oblige them to execute it under direction of the court. They were compellable alſo in ſame manner to execute the next truſt in the will to one of teſtator's name and kin. Defendant's counſel were ſo aware, this would be the conſequence ſo far, they endeavoured to ſeparate the caſes of the nephew and kin from the other proviſions in the will by ſaying, the two former were now at an end, and that it does not follow, becauſe the court might interpoſe in thoſe caſes, if applied to, they ſhould have juriſdiction in the preſent caſe; which comes under the next proviſion, and is as expreſs and ſpecial a truſt as either of the other; with this only difference, that thoſe truſts were at an end, whereas

Collegiate body compellable to execute a truſt as a private perſon, and tho' the bill not brought recently.

whereas this was permanent, to be executed on every vacancy, and calls as loudly for direction of the court as either of the others. If a bill had been brought recently againſt the heir at law, it muſt have been for two purpoſes: firſt, to have the will declared, well proved and eſtabliſhed againſt the heir, and all claiming under him; next to have the direction of the court for carrying the truſts of the will into execution: the court would have
(469) taken into conſideration, what were the truſts, and the directions proper on them: and had this truſt for the ſenior divine come under conſideration, the court would have declared their ſenſe of the words, and who came within that deſcription; and if the College afterward executed other truſt, contradicting the judgment of the court in that inſtance, by preſenting a Fellow they thought came under that deſcription, the court would not have endured ſuch an oppoſition, but would have relieved the injured party. So if the college were diſpoſed to have purſued the opinion of the court, but were intimidated by the viſitor, who put a different conſtruction on the will, the court would have carried its own decree into execution. If this would be ſo on a recent application, there is no alteration in the nature and reaſon of the caſe, that the directions on this part of the truſts are not prayed till wanted in this particular inſtance. There are many caſes of plain truſts, of which there is no doubt, and which the truſtees execute without applying to the court: but when there comes a more remote truſt of a doubtful nature, and it is neceſſary to pray for the direction of the court, it would be equally proper to apply then as on the firſt: and this is the preſent caſe; wherein either the College, who are truſtees, or the perſon thinking himſelf ſenior divine, for whom they are intruſted, may come into this court for directions; which is the purport of the preſent bill. This is grounded on the ſpecial truſts in the will, allowing the Biſhop to be appointed general viſiter by the founder; for notwithſtanding that, this being given on ſpecial truſt, the viſitor has no juriſdiction to determine, who ſhall be preſented to this rectory, or to interpoſe in the execution of the truſts of this will. This would be my opinion, were there no inconſiſtency between the ſtatutes of the College and the will: but when the nature of thoſe ſtatutes are conſidered, and ſo far as relates to the College livings, are compared to the truſts of the will, it will appear, that to judge by the ſtatutes, which is the viſitor's rule, will be contrary to the intent of teſtator, and defeating the will. The members are ſworn to obey the ſtatutes on pain of amotion: but

The ſtatutes inconſiſtent with the will.

but if an advowſon is accepted by them on other terms, that muſt be conſidered as not within the compaſs of the oath to the founder: or elſe it muſt be ſaid, one cannot be the regulator of his own gift, if there is a viſitor, And in all the inſtances the viſitor, whoſe judgment muſt be founded on the ſtatutes, cannot execute the truſts of this will; for that would be departing from the ſtatutes; and the adhering to the ſtatutes would be adding farther circumſtances to the truſt, than the teſtator preſcribed, and making it the founder's will, not his. I agree, that a ſubſequent benefaction may be put under the ſame power as the founder's; and the viſitor will have an equal authority over them; for being a co-founder in that reſpect, he will be ſo far conſidered as appointer of the viſitor. In this caſe the teſtator is donor; has given rules in his will, which are his ſtatutes; has not made the Biſhop viſitor; nor excluded this court from its juriſdiction by putting it elſewhere. The right of the viſitor is ſaid to be ſubmitted to by the anſwer to the appeal: but that admiſſion cannot give a juriſdiction the viſitor has not, or take away the ordinary juriſdiction of the court, or bind the parties themſelves. 2 *Rol. Ab.* 312. *Pl.* 14, that the party may pray a *prohibition* againſt his own ſuit. The objection, that this ſuit is between two, both ſubject to the viſitor's power, proves too much: for none will contend, that in matters out of the juriſdiction of the College between two Fellows, the viſitor is to judge. Nor is it an argument, that becauſe an action for damages will lie againſt the viſitor for exceeding his juriſdiction, therefore this court will not interpoſe. It might be more for the party's benefit to have a ſpecific execution of the truſt, and the living for life, than the action againſt the viſitor. So it might be ſaid, where the party proceeds out of his juriſdiction, an action will lie againſt him; yet in ſuch a caſe a *prohibition* will go notwithſtanding. I do not ſee, the viſitor has any ſuch power of compelling the preſentee to reſign at the end of the year, as the will requires. He may indeed proceed to amotion in many inſtances on the ſtatutes; but then it muſt be for offences contrary to the ſtatutes; having no juriſdiction as to breaches of the will: but this court can do it, in the ſame manner as it enforces performance of its other decrees; the nonperformance of which will be a contempt, and puniſhed as ſuch by the ordinary proceſs of this court. An obſtinate man may indeed in all caſes prevent a ſpecific performance; but he does it at the expence of his liberty: nor was that ever an objection to the propriety of making the decree. This is a queſtion of mere matter

Subſequent donation may be put under ſame power as the founder's.

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Anſwering gives not viſitor juriſdiction.

This court may inforce performance.

matter of property, who ought to have this living under the ſpecial truſts of the will. I cannot ſay (and yet if the plea is allowed I muſt ſay) the plaintiff is not intitled to the opinion of this court on the truſt in queſtion of this nature, or may go higher on any miſtake, and not be finally concluded by any ſingle opinion.

LORD CHANCELLOR.

As I entirely concur with the *Maſter of the Rolls* in the main queſtion, ſo likewiſe in his manner of treating it. The caſe is fully ſtated; and the only queſtion now to be determined is, whether the plea is ſufficient in law and equity to ouſt this court of all manner of juriſdiction of the cauſe?

Under the general queſtion two points are made. Firſt, whether it is ſufficiently ſhewn by the plea, that the Biſhop is general viſitor of this College? Secondly, ſuppoſing (471) that to be ſhewn, and that it ought to be ſo taken on this plea, whether the preſentation to the living under the will, ſet forth and admitted by the plea, is within, and a proper ſubject of the viſitatorial power?

No appearance, or anſwer will give a juriſdiction to a limited court.

A third point was attempted for defendant: that the anſwer by the Maſter, *&c.* particularly by the plaintiff before the viſitor, and by ſeveral acts, there has been a ſubmiſſion to the juriſdiction of the viſitor, which is concluſive. But there is no colour for it; for in caſe of a private, particular, limited juriſdiction, and of courts proceeding by rules different from the general law of the land, no appearance, anſwering or pleading of the party, will give a juriſdiction to the court: but if there is a want of juriſdiction in the cauſe, it may be called in queſtion at any time, even after ſentence; which is the caſe of all prohibitions, granted every term by the common law-courts for a nullity of juriſdiction; ſo that it may be applied for even againſt the party's own ſuit; and the ſame holds in a collateral action or ſuit.

As to the firſt point I agree, that it is not neceſſary, and therefore not proper to enter into a ſtrict determination, whether or no all the ſtatutes are ſet forth in the plea; it is not poſſible for the court to take notice of it; but on ſo much as is ſet forth, I think, it appears, the Biſhop is general viſitor: but he is by the ſtatutes prohibited to give new ſtatutes, or put in execution thoſe of any other: if

The Biſhop general viſitor though that power

he

he does, the College are abſolved from obedience; Q. *Eliz.* reſerving the power of adding, &c. hence ariſes the difficulty as a caſe may happen, in which the Maſter, &c. may be ſubject to be removed by another power different from the Biſhop's, and that even for obeying the Biſhop's ſentence, and how then can the Biſhop be ſaid to be general viſitor? But I am ſatisfied on that head that the Biſhop for the time being is general viſitor, till ſuch a caſe happens. The grounds, on which, *B. R.* went in the caſe of *Manchester College, The King* v. *Biſhop of Cheſter, Pas.* 1. *G.* 2. govern that queſtion: a *Mandamus* was iſſued to the Biſhop to admit a fellow of that College; the Biſhop returned, that it was a royal foundation; that he was general viſitor; and ſet forth the conſtitution: on exception to the return, *B. R.* ordered a peremptory *Mandamus* on this ground, that it was clear, the Biſhop's viſitatorial power was then ſuſpended; for he was warden of the College, and could not viſit himſelf: that powers of this kind might ceaſe and revive without inconvenience: and that at that time the juriſdiction was in the King's courts, becauſe no viſitatorial power was in force. By like reaſon as that court held, that a general viſitatorial power might ceaſe and revive, and that during the ceſſer the juriſdiction would for want of particular appointment or reſervation of power devolve on the King's court of general juriſdiction; ſo in the preſent, where the power of legiſlation is reſerved to the crown: therefore I am ſatisfied on the doubt I had.

may be ſuſpended, and revive.

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This leads to the ſecond and main point, on the merits of the plea. I agree, that the preſentation ſet forth by the plea, is not a proper ſubject of viſitatorial power. To argue this clearly the original and nature of viſitatorial power muſt be conſidered. The original of all ſuch power is the property of donor, and the power every one has to diſpoſe, direct, and regulate his own property; like the caſe of patronage; *cujus eſt dare*, &c. therefore if either the crown or the ſubject creates an eleemoſynary foundation, and veſts the charity in the perſons who are to receive the benefit of it, ſince a conteſt might ariſe about the government of it, the law allows the founder or his heirs, or the perſon ſpecially appointed by him to be viſitor, to determine concerning his own creature. If the charity is not veſted in the perſons, who are to partake, but in truſtees for their benefit, no viſitor can ariſe by implication, but the truſtees have that power; from which account it appears, the nature of this power is *forum domeſticum*, the private juriſdiction of the founder, and cannot

Origin and nature of viſitatorial power.

Property of donor.

not extend farther, unleſs ſome other perſon grafts upon it, and by expreſs words or neceſſary implication ſubjects the eſtate or emolument, given by him, to the ſame viſitatorial power, and to be governed by the ſame rules; and then the former viſitor is a viſitor created by that ſubſequent founder or donor: the grounds of which appear from *Holt* in *Philips* v. *Bury*, 1 *Ld. Ra.* 5, more at large in *Skin. Sho. Parl. caſes* 35. The topics of Biſhop *Stillingfleet* are drawn from foreign laws; to be governed by the Eccleſiaſtical law, which the law of *England* totally diſclaims and rejects. The founder may give a general power; or may limit and bind by particular ſtatutes and laws; may give the viſitor power of altering or giving new ſtatutes; or may reſtrain from doing it, or from acting according to any other; as is done in the preſent caſe. If the power to the viſitor is unlimited and univerſal, he has in reſpect of the foundation and property moving from the founder no rule but his ſound diſcretion. If there are particular ſtatutes, they are his rule, he is bound by them; and if he acts contrary to or exceeds them, acts without juriſdiction; the queſtion being ſtill open whether he has acted within his juriſdiction or not, if not, his act is a nullity. *Holt* in *Philips* v. *Bury*, where the Biſhop of *Exeter* was undoubtedly viſitor generally.

To apply this general reaſoning: I will lay down ſome propoſitions, which I will afterward illuſtrate. Firſt, this rectory was no part of the property of the founder: but given by a ſubſequent donor on ſpecial truſt. Secondly, this truſt is limited by rules different from, and in ſome parts contrary to the ſtatutes of the foundreſs. Thirdly, the viſitor has authority to judge only according to the ſtatutes of the foundreſs, and is reſtrained from acting otherwiſe; conſequently has no power to execute this truſt. (473) Fourthly, the Biſhop cannot give remedy in many caſes, which may ariſe on this truſt. Fifthly, as a conſequence from the whole here is a nullity of juriſdiction in the viſitor; and relief muſt belong to the King's general courts of juriſdiction.

This not founder's property; but given afterward on ſpecial truſt.

As to the firſt the fact is plain; and admitted to be a truſt. I agree in general, that if a ſubſequent donor gives the legal eſtate, or in truſt, for the College without a declaration of a ſpecial truſt it will fall under the power of the general viſitor to judge of the legal property in the one caſe, or the equitable in the other; becauſe by giving in truſt for the College generally, and neither creating a diſtinct

tin& viſitor nor a ſpecial truſt, the donor has by plain implication intended, it ſhould fall under the general ſtatutes and rules of the College, and be regulated with the reſt of their property: although in the latter caſe indeed a bill muſt be in equity to compel the truſtees, if they refuſed: but in the preſent, the teſtator has declared a particular, ſpecial truſt which muſt in ſome way be carried into execution, and the will obſerved.

The ſecond appears ſufficiently in many inſtances on comparing the truſts of the will with the ſtatutes.

The third alſo appears plainly from the ſtatutes. But it is ſaid, the will may be conſidered as a new ſtatute as to this: if ſo, the viſitor is abſolutely reſtrained from executing this truſt, and the Maſter, *&c.* prohibited from obeying; from which would follow abſurdities. The objection is founded on the principle, that this is a living within the deſcription of the ſtatute *cujus ad Collegia collatio pertinet:* but it is not ſo; thoſe words and that ſtatute are to be conſtrued of livings, where not only the legal eſtate, but alſo the truſt and equitable ownerſhip, belongs to the College abſolutely: whereas in this caſe, though the legal eſtate of the advowſon is in the College as a corporate body, it is on ſpecial truſt for a particular perſon deſcribed; which puts an end to the viſitor's power over it; for that ſhould not ſet up a different rule in equity, from what would be at law as to the legal eſtate under like circumſtances. Suppoſe, after the foundation of this College the crown had granted an advowſon or land to the ſenior Fellow of that College: this grant would have operated to make the ſenior Fellow a ſole corporation according to 4 *Leo.* 190, which was admitted in the caſe of *the Univerſity of Cambridge* v. *Crofts*, *B. R. Paſ.* 13 *Q. Anne*, the Biſhop could not take away the legal eſtate veſted in a ſole corporation, though it happened to be part of the aggregate body, and give it to the aggregate body.

Viſitor can judge only by the ſtatutes.

As to the fourth, it is admitted for defendant that if the deviſe had been to a ſtranger on the ſame truſt, (i) the viſitor could have no power over it. The equitable muſt be like the legal; only the College would be obliged to apply to this court to compel the truſtees to execute. It cannot differ

Viſitor cannot give a remedy on this truſt.

(i) Viſitor can only decide a private diſpute; if there is a diſpute by a third perſon againſt a corporation, to perform an agreement, viſitor cannot decide, as he cannot compel a ſpecific performance. Cow. 378, nor tender an oath. Douglas, 342.

differ the caſe, that the corporation of the College happened to be the truſtees. Suppoſe, it had been on truſt to preſent a member of another College, the viſitor of this could have no power over it: and the preſent caſe differs not in ſubſtance from that. On the firſt branch of this truſt and on the laſt, where it is to preſent to a ſtranger, it is admitted, the viſitor could have no power: but it is contended for over the intermediate branch, becauſe among the members of the College ſubject to his juriſdiction; and is compared to the caſe of a particular eſtate to the College, remainder over: but that is not like this caſe; the College there having the abſolute ownerſhip during its continuance, here not. Suppoſe on a vacancy all the Fellows in their turn ſhould do an act, which the Maſter and major part of the Fellows ſhould conceive to be an abſolute refuſal, and ſhould thereon ſeal a preſentation to a ſtranger; and before inſtitution one of the Fellows ſhould allege, that in fact he had not refuſed, that the College miſtook, and ſhould preſent him; and he appealed to the viſitor upon their rejecting his claim: the viſitor could not judge of this; there intervening the right of a ſtranger not ſubject to the viſitor's juriſdiction, and whom he could not compel to give up his preſentation; and therefore none but one of the King's courts of equity could judge, if it was a binding refuſal, or could give relief. Suppoſe a Fellow completely intitled ſhould at the end of the year refuſe to reſign: the viſitor could not compel him, for he could compel only for breach of the ſtatute, which this is not: application for relief muſt be to ſome court of general juriſdiction, who may decree a reſignation of the fellowſhip or living, and enforce the decree under the general penalties of contempt: ſo that this argument for defendant turns the other way. I admit, that in *Philips* v. *Bury*, contumacy was held good cauſe of expulſion, and *B. R.* would not examine into the fact of that contumacy; which was right: but it appeared to be a contumacy within the Biſhop's juriſdiction, which muſt be ſhewn, though the contumacious fact need not be ſpecially ſhewn. But admitting for argument ſake (and no otherwiſe) that that need not appear in expulſion for contumacy, it does not follow, that becauſe a perſon may take advantage of general pleading to cover a nullity of juriſdiction, he therefore will. I am ſure the preſent Biſhop would ſcorn to take ſuch advantage, if it might be taken. But we are not now on a caſe of expulſion: it is ſufficient to ſhew that the viſitor, though general, could not give an adequate remedy in many caſes on this truſt: and the caſe of *Eton College*,

Mich.

Mich. 14 *G.* 2. the *King* v. *Bland*, is an authority; where the court held, that the bare averment of a viſitor would not preclude the juriſdiction of the court, but the extent of his authority muſt appear, that the court may be ſatisfied, he can do complete juſtice; and therefore a *mandamus* was awarded.

It muſt appear, that viſitor can do complete juſtice.

(475)

As to the fifth, whoever has a right by this truſt, muſt have remedy; and I have ſhewn, the Biſhop has not power to give it. It is admitted, that after teſtator's death, a bill might be to eſtabliſh this charity and carry this truſt into execution, and the viſitor would have no juriſdiction; the court muſt then have decreed for a performance according to the will; and ſuppoſing a queſtion had then ariſen at the bar on the conſtruction of the words of the will *ſenior Divine then Fellow*, the court muſt have determined that, and have laid down rules for execution of the truſt by the College in all future times; which would have been binding to the College, the viſitor, and all perſons: the ground of which is, that there muſt have been a complete performance, and there is no inſtance of this court's decreeing a truſt by piece-meal or parts. Nor is it any anſwer, to ſay that no ſuch decree has been made; for the legal eſtate is in the truſtees, and this truſt is for ever executory, and always ſubject to be ſo till determined in equity, (k) and therefore ſuch a conſtruction may be made at any time. The reaſon of the caſe of the *King and this very College*, 4 *Mod.* 433. *Skin.* 359, 368, 393, 546. *Comb.* 279, is very material. It might be ſaid there, as has been here, this is a power ſuperadded and annexed to the viſitor's: the court ſaid there, it aroſe on the public laws of the land. The only difference between the two caſes is, that aroſe on a public act of parliament relating to government; this on the general rules of equity, which is part of the general law of the kingdom. It is ſaid, new donations may be ſubject to the viſitor's juriſdiction, as it has been held, new engrafted Fellows may; but that is not *ad idem*; for this is founded on a new donation and ſpecial truſt: the caſe urged for this is that of *Clare Hall* (long after that in 5 *Mod.* 421,) where I allowed the plea. I am not an enemy in general to viſitatorial power, but incline to ſupport it as far as neceſſary; and went there farther than *Holt* did in 5 *Mod.* but the reaſons, on which I founded myſelf there, hold not here. There was a plain implication to ſubject to the general viſitatorial power to avoid confuſion, which would ariſe, if every one coming in as a Fellow ſhould

Relief muſt be in the King's courts of general juriſdiction.

Complete performance of truſt muſt be decreed. May be at any time.

Ante.

New ingrafted Fellows may be ſubject to viſitor, to avoid confuſion.

(k) 2 Brown, 51.

ſhould not be ſubject to College diſcipline: and in 2 *Jo.* 175, it is determined, that power of expulſion includes power of admiſſion. I there indeed laid weight on the inconveniencies which might ariſe from a different deciſion; which were obvious, but different from the preſent, for it is not ſo neceſſary in this caſe, that every ſpecial truſt, conſiſting of various parts, ſhould be ſubject to the juriſdiction of that viſitor: nor will the like confuſion enſue. The viſitatorial power, as allowed and eſtabliſhed by the law of *England*, and on the grounds on which it is eſtabliſhed, is moſt uſeful in Colleges and learned ſocieties; and I am for ſupporting it as far as it is eſtabliſhed by the conſtitution of this kingdom, particularly by the judgment in *Exeter College*'s caſe: (l) but am not for extending it farther; much leſs for giving way to and extending it on principles and rules derived from foreign laws, which the law of *England* rejects: and concur on the whole, that the plea ſhould be over-ruled.

Viſitatorial power, how far to be ſupported.

(476)

Caſe 194. *Anonymous, June* 15, 1750.

MOTION on the part of the plaintiff's leſſees of the Dean and Chapter of *Durham*, for an injunction to reſtrain defendants, certain fiſhermen, from uſing ferry-boats on the river *Tyne*.

LORD CHANCELLOR.

Injunction before anſwer to reſtrain other ferry-boats, denied.

(m) This was moved before; and denied, becauſe the plaintiffs had not ſhewn, that they had kept up ſufficient ferry-boats. I had other doubts on that motion. It is not of courſe to come into this court on infringement of a franchiſe to have an injuction upon filing the bill before anſwer, the general rule is after the anſwer, in bills for an injunction to ſtay waſte, the court will grant it before anſwer. The general rule is after the anſwer, in bills for an injunction to ſtay waſte, the court will grant it before anſwer, on filing the bill, (n) and ſhewing that waſte may be committed; becauſe there cannot be a compenſation, and it may be an irreparable miſchief. To be ſure there may be ſome caſes, as in a matter of account of damages, where the court does it; that is, where the right of the plaintiff appears on record. In caſes therefore of a new invention by

Granted to ſtay waſte.

Or where the right appears of record.

(l) 2 Vol. 328. (m) 2 Vol. 414, 453.

(n) 2 Brown, 65, 88. A general affidavit, the plaintiff was entitled to the Fee Simple, is not ſufficient to obtain an injunction, a particular title muſt be ſet out. 1 Brown 57.

by letters patent, a bill may be filed for infringing that right; and before anſwer (the right appearing by matter of record) on filing the bill and affidavit it may be granted. So in the caſe of a * book-vending, which by act of parliament is veſted in a particular perſon, though the right not appearing by record of this court, yet being grounded on an act of parliament, that might be a foundation to grant injunction before anſwer: but otherwiſe in theſe ſpecial caſes you muſt ſtay till anſwer comes in. However as the right of the plaintiffs to the ſole uſe of this ferry appears on record by a decree of Lord *Cowper*, I thought that the record of this court was a ſufficient foundation to grant an injunction before anſwer: and there have been caſes of that kind; where a right has been tried by the parties, that right appearing by record of the court, has been thought a foundation to grant it before anſwer. But this was a very tender caſe to interpoſe to reſtrain before anſwer; being of great conſequence to the city of *London* from the coal-trade. Therefore as it was not ſhewn, that the plaintiffs kept up ſufficient ferry-boats to carry paſſengers, &c. I denied the motion. This has now been endeavoured to be ſhewn by affidavit; but the affidavit is not ſufficient for that purpoſe. On the circumſtances I will not reſtrain, and conſtrue it a breach of the privilege. This is like the ferry on the *Thames*, and paſſage-boats to *Graveſend*, which have a ſole right of carrying, yet other wherries do carry every day; and it is not held an infringement of that right.

(477)

Ameſbury *verſus* Brown, *June* 16, 1750.

Caſe 195.

A Woman was ſeiſed in tail of an eſtate, reverſion in fee to the right heir of her brother, of whom ſhe was one out of four; but ſeiſed of the equity of redemption only; the legal eſtate having been conveyed by mortgage by her anceſtor, the teſtator. She levies a fine, and makes a conveyance of this eſtate by leaſe and releaſe to *Brown* in conſideration of money paid, and of paying 600*l.* due on the mortgage, and of paying legacies by the teſtator's will charged on his eſtate. Afterward ſhe intermarries with *Brown*; and previous to the marriage a ſettlement is made of this eſtate (which was the huſband's under the prior purchaſe) to the huſband for life, afterward to the wife for 99 years if ſhe ſo long lived, remainder to iſſue of the marriage, remainder over. After the marriage,

Huſband of tenant in tail, takes in a mortgage, and is in receipt of rents on a bill to redeem by reverſioner after wife's death; huſband not allowed intereſt on the mortgage in life of his wife.

* 1 Brown 451. 2 Brown 80. (o) 1 Brown 218. Ante 258.

marriage, the huſband takes an aſſignment of the mortgage, reciting that the premiſſes had been deviſed to his wife, and a conveyance of the legal eſtate in fee to uſe of the huſband: the wife dies without iſſue; the huſband continues in poſſeſſion.

The three co-heirs of the firſt teſtator, intitled by the reverſion in fee, bring a bill againſt *Brown*, the ſurviving huſband, to redeem this eſtate on payment of the incumbrances on it, ſo far as they are obliged to pay, and to have an aſſignment of three-fourth parts to them; inſiſting they were not obliged to pay intereſt on the principal ſum of theſe incumbrances farther back than from the death of the wife: and that as defendant has taken in the mortgage, and received the profits, the intereſt during her life was ſuppoſed to be paid: though in general it was a prevailing principle, that tenant in tail ſubject to a preceding incumbrance has a right to continue not only the capital but to charge with intereſt alſo; yet there is another rule, that if tenant diſcharges the intereſt of incumbrances, neither he, nor any in his place, ſhall be permitted in equity to ſet up that as a fact undone, but the remainder ſhall have the benefit of it; and none in place of tenant in tail can inſiſt on being a creditor on that eſtate.

For defendant, it was inſiſted, that though he received theſe profits, he received in right of his wife, tenant in tail, who was not obliged to keep down the intereſt for reverſioner; and received them on ſuppoſition, that the ſettlement was good, and the ownerſhip of the eſtate would follow it. Therefore he muſt be redeemed on payment of the whole principal and intereſt, during the time he was in poſſeſſion, as if the mortgage had remained in the mortgagee. In *Sarjeſon* v. *Cruiſe*, *October* 26, 1742, *Jane Pit*
(478) was tenant for life of an eſtate with power to charge any ſum, not exceeding 4000*l.* on the eſtate in queſtion; which eſtate was limited to her ſon *William* in tail, remainder to the right heirs of the father: the plaintiff claimed in the ſame way as the preſent plaintiffs; and inſiſted, they were under no neceſſity of claiming as heir at law of *William Pit*, as the remainder in fee never came into poſſeſſion in his life, but to the right heir of the father; and therefore the perſonal eſtate of the infant *William Pit* was obliged to keep down ſuch intereſt, as accrued due in life of tenant in tail, on which his Lordſhip was againſt the plaintiffs; for that the owner of an eſtate in tail, remainder over, never was made a debtor in ſuch a caſe.

caſe. But what the court went on in its determination, which was in favour of the heirs at law, was, that *William Pit* being an infant, the guardian ought to have applied the rents and profits of the eſtate to keep down the intereſt in diſcharge of the incumbrance; and therefore what ought to be done by the guardian ſhould be conſidered as done; and conſequently the real eſtate diſcharged ſo far, as the rents and profits in life of the infant would go in diſcharge: but if that not ſufficient, it was made an incumbrance on the remainder. *Chaplin* v. *Chaplin*, 3 *Will.* 235, ſhews, there is no obligation on tenant in tail to keep down intereſt of a mortgage. This is to be conſidered in the ſame light, as if the mortgage had been in a ſtranger. It is not the caſe of coming to have the perſonal eſtate applied in exoneration againſt the perſonal repreſentative of the wife, which would be allowed in general. The queſtion is, whether a huſband, tenant in tail in his wife's right, is intitled to intereſt of the mortgage accruing during wife's life? Notwithſtanding the rule inſiſted on, a court of equity will ſtill take into conſideration the manner in which that mortgage is paid off: although if it had been a diſtinct tranſaction of a huſband tenant in tail taking in a mortgage with a view of diſcharging and clearing the eſtate, without other circumſtances; the court would not conſider the tranſaction in any other light.

LORD CHANCELLOR.

This is clearly as favourable a caſe for the repreſentative or huſband of tenant in tail, ſeiſed of an eſtate in right of his wife, to claim the benefit of the intereſt, that accrued during life of that tenant in tail on this mortgage, and to have it paid on a redemption made by the reverſioner, as could come before the court; becauſe here was a plain intent in the tenant in tail to have made the eſtate her own: but ſhe has failed in the manner of doing it, by levying a fine only; which could only bar the iſſue; not the reverſioner or remainder. She being diſappointed therein, the reverſioner, who might have been barred, comes to have poſſeſſion of the eſtate. This being ſo favourable a caſe therefore for defendant, I directed it to ſtand over, to ſee (479) if there was any determination to govern my judgment. There is none directly on the point; therefore I muſt determine on general rules: and what weighs with me, is the fear of breaking in on general rules; which may be of bad conſequence in other caſes; overturning what has been taken to be eſtabliſhed.

She was intitled herſelf to the reverſion in fee of one fourth part of the reverſion; the other three-fourths belonging to the plaintiffs, the other three co-heirs. She might by recovery have barred the reverſion in fee in the whole: by fine ſhe could bar it in her own fourth part. The taking the aſſignment of the mortgage by the huſband appears to be after the marriage from the recital, when the huſband, if the ſettlement had been good, was ſeized in his own right for life: if not good, and the eſtate in tail continued, he was ſeized in right of his wife.

The queſtion ariſes, from what time intereſt is to be computed? I am of opinion, the huſband is not intitled to have any allowance of three-fourth parts of the intereſt, conſidering him in any light.

Firſt conſider him as a purchaſer of this eſtate by the agreement and conveyances, made with her, then a *feme ſole*; which is the true way: but if that was out of the caſe, conſidering him as huſband of tenant in tail in poſſeſſion of the eſtate, having taken in a mortgage of the eſtate: the rule of equity would be, that his purchaſe would be defeated: but he ſhould have the benefit of the mortgage ſo taken in for ſatisfaction of his principal and intereſt, that is, ſo far as not ſatisfied by the rents and profits of the eſtate: and if his purchaſe was defeated, he muſt be conſidered as a mortgagee. If as mortgagee in poſſeſſion, he muſt account for the rents and profits of the eſtate; and out of theſe rents and profits the intereſt of the mortgage muſt be kept down. If he had purchaſed the reverſion only, and taken an aſſignment of the mortgage, and never came into poſſeſſion, and his purchaſe then defeated and evicted, he would be intitled to have his whole principal and intereſt; becauſe he received nothing out of the eſtate to keep down that intereſt. But thoſe profits he received muſt be applied to keep down the intereſt of the mortgage, conſidering him as a purchaſer, or mortgagee in poſſeſſion if his purchaſe does not ſtand. This is on the foot of the purchaſe; taking it in the leaſt favourable light for defendant: nor on the foot of the ſettlement will it mend his caſe; for as tenant for life under that ſettlement he would be bound to keep down the intereſt: ſo would the wife, if ſhe ſurvived.

Which brings it to the ſecond way of conſidering it, as if the purchaſe and ſettlement were out of the caſe, and conſidering him as having married tenant in tail of an eſtate,

tate, reverſion in fee to ſtrangers as to three-fourths, and being in poſſeſſion in her right, taking in a preceding mortgage binding that eſtate in tail, and afterward continuing in poſſeſſion, and receiving the rents and profits. The queſtion then will be, whether ſuch a huſband, after death of his wife without iſſue, is intitled notwithſtanding receipt of the profits, not to be redeemed without paying the whole intereſt? In general a court of equity endeavours to make every part of the ownerſhip of an eſtate bear part of the incumbrance: as if there is tenant for years or life ſubject to a mortgage, they muſt keep down the intereſt during that time. But there is a particular eſtate, called an eſtate tail, which is diſtinguiſhable: and therefore it is true that in general caſes, if there is tenant in tail remainder over, ſubject to a preceding mortgage or incumbrance; and tenant in tail is in poſſeſſion and receipt of the rents and profits, the mortgage in hands of mortgagee; and he lets the intereſt run in arrear without applying to keep it down; neither the iſſue in tail nor the remainder-man can come againſt that tenant in tail to compel the keeping down the intereſt, nor againſt the repreſentative of tenant in tail after his death, to compel the indemnifying and diſcharging the remainder from that arrear of intereſt incurred during poſſeſſion of tenant in tail and his receipt of the profits, unleſs in that ſingle inſtance, which was the caſe of an infant, of *Sarjeſon* v. *Cruiſe*. *Chaplin* v. *Chaplin*, is ſaid to be determined differently from it: but I do not know, whether they agree in circumſtances which may make a great difference. I went on the general rule, that the act of a guardian or truſtee of an infant ſhall not alter his property or that of thoſe coming after him. Where there is tenant in tail of full age, courts of law as well as equity, conſider the reverſioner or remainder as in the power of that tenant in tail. But the caſe of an infant-tenant in tail is different; as he cannot bar the remainder unleſs under the King's privy ſeal; a method which is never granted voluntarily to change the rights of the parties, but in caſe of ſome family-ſettlements, which is not the preſent caſe. The next conſideration is, how the caſe will be, ſuppoſe, that tenant in tail takes an aſſignment of that mortgage to himſelf, and dies without barring the remainder in fee. Taking the aſſignment to himſelf, he will be conſidered as owner of the eſtate, and, as it is ſaid in *Chaplin* v. *Chaplin*, ſeiſed of an eſtate which may continue for ever: then perhaps the reverſioner would have ſtronger reaſon to ſay, the whole eſtate was diſcharged of this mortgage, than on the other ſide the repreſentatives

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of

of tenant in tail could have to ſay, they ſhould be reimburſed the intereſt incurred due during his life; becauſe it may be conſidered as waiting upon the inheritance during that time: but it has not been carried ſo far as that. In the caſe of Mr. *Smith* of *Weal Hall* in *Eſſex*, tenant in tail died without barring, but had taken in a mortgage, which was conſidered for the principal as an incumbrance on the eſtate: but the queſtion of intereſt did not ariſe there. Then ſuppoſing this taken by tenant in tail himſelf in poſſeſſion, how ſtands it in reſpect of the intereſt? No caſe is cited, where ſuch a tenant in tail being in poſſeſſion, his perſonal repreſentative has been allowed to burthen the reverſion in fee with the intereſt incurred during his life, where he was owner both of the eſtate in poſſeſſion and the charge. And it would be of very miſchievous conſequence, if it ſhould be taken to be otherwiſe. Suppoſe he had died, and left iſſue in tail: could the perſonal repreſentatives of tenant in tail come againſt the iſſue to burthen that eſtate with the intereſt of that mortgage? It would be conſidered as taken in for the benefit of the iſſue in tail. Caſes of this kind depend on ſuch a variety of circumſtances, it is impoſſible to draw the line. The tenant in tail was but tenant at will to the mortgagee; who might have brought an ejectment, and turned him out of poſſeſſion, and have received the rents and profits: there the profits would be taken from the tenant in tail during his life. Suppoſe, tenant in tail had afterward brought a bill to redeem the mortgage; he muſt redeem on payment of principal, intereſt, and coſts; then ſhould that burthen the eſtate of the remainder with all that intereſt, which had been paid out of the rents and profits of that eſtate in the hands of the mortgagee? None can tell, when tenant in tail took the mortgage, or on what grounds it was done. The reaſon might be, that the mortgagee intended to bring an ejectment, and turn him out of poſſeſſion, and take the rents and profits to his own uſe. That does not appear: but various reaſons might be for taking in the mortgage; to prevent ſuits, *&c.* by foreclоſure or ejectment: and it would be making it liable to too great uncertainty to ſay, that all the minute conſiderations of tenant in tail, taking an aſſignment of a mortgage ſhould be conſidered by the court on a queſtion between the perſonal repreſentative of tenant in tail and the reverſioner, after it came into poſſeſſion. I do not ſee how this differs from the caſe of intereſt paid by tenant in tail. Suppoſe, the mortgage had remained in the hands of a ſtranger, the mortgagee; and tenant in tail, after being in poſſeſſion had paid the intereſt: the perſonal repreſentatives of that tenant in tail could

Ante.
Kirkham v. Smith.
June 23, 1749.
Ante 258.

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could not come againſt the owner of the reverſion for a ſatisfaction of that ſo paid out of the eſtate. There is no inſtance of it. Then if the intereſt is kept down, not by payment of the mortgage, but by tenant in tail being in poſſeſſion and taking the profits of the eſtate and mortgage to himſelf; he has paid himſelf that intereſt out of the rents and profits of the eſtate. But that is not the caſe: and therefore I am unwilling to make a precedent of the repreſentatives of tenant in tail, calling back the intereſt of that incumbrance paid; and it is right to let things ſtand, as the courts find them at death of tenant in tail: neither is that ſtrictly this caſe; this being a caſe of a mortgage taken in by huſband of tenant in tail ſeiſed in right of his wife; but that will not make any difference; for the huſband of tenant in tail ſo ſeiſed ought to be conſidered in the ſame ſtate as tenant in tail ought to be exactly, and in no better; taking the eſtate ſubject to all the incumbrances, actions, and remedies, the mortgagee had in the eſtate, and to the right and eſtate the reverſioner or remainder-man had in her eſtate; and conſequently has not a right, after having received the profits of the eſtate during the life of the wife, to come againſt the remainder for ſatisfaction of the intereſt; which naturally the rents and profits are to anſwer. This is not ſetting up a right to come againſt the perſonal eſtate of tenant in tail to ſatisfy arrears of intereſt; but ſetting up a right in the repreſentatives of tenant in tail to bring a burthen on the reverſion in fee, which has been diſcharged by tenant in tail himſelf: and, as there is no precedent, I will not make one. Beſides it falls in with natural juſtice, that thoſe, who have a divided intereſt of an eſtate, ſhould keep down the burthen during their own time.

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Therefore an account of the profits muſt be directed, accrued ſince the death of the wife: and from that time he muſt have an allowance of the intereſt accrued ſince on the mortgage, and on the legacies that were paid off.

Legacy charged on real eſtate, the perſonal not to be applied in aid.

The teſtator, having given his eſtate generally after payment of debts and funeral, without mentioning legacies, afterward gives four legacies to each of his four ſiſters; and in the ſame clauſe adds, "all which legacies, I mean, (p) ſhall be paid out of my freehold

(p) Where enumerated legacies are expreſly charged on land ſubſequent legacies ſhall not affect it, but ſhall be paid out of the perſonal, 1 Brown 261. If the debt is not contracted by the party, the perſonal eſtate ſhall not exonerate the real. 2 Brown 5760. 2 Wms. 591. 2 Vol. 569. 2 Brown 191.

freehold eſtate in *N.*" and by a ſubſequent clauſe gives a power to mortgage and charge the real eſtate for payment of that money.

It was inſiſted, that a legacy generally given is payable out of the perſonal eſtate: and though afterward made a charge on the real, yet, as heir at law is not to be diſinherited, the court looks on it, that unleſs the perſonalty is expreſsly exempted, the legacies ſhall be payable out of the perſonal.

LORD CHANCELLOR.

This is not within the common rule; not being a common charge on the real eſtate in aid of the perſonal, but an expreſs incumbrance on that eſtate; an expreſs gift of the legacy out of the real eſtate; (q) which wherever done, the real muſt bear that burthen, and the perſonal is not applicable in aid: and this is ſtrengthened by the ſubſequent clauſe; by which he meant, the tenant in tail ſhould have power to do it even without ſuffering a recovery.

Caſe 196.

Aſtley *verſus* Powis, *June* 23, 1750.

Poſt. *June* 30.

Rate of intereſt.

A Sum of money was due by covenant on articles on a decree againſt Mr. *Langley* in 1694, and a report was made and confirmed, which aſcertained and liquidated the whole ſum and intereſt thereof at the then legal intereſt as well as the principal, *viz.* 6 *per cent.* amounting to an accumulated ſum of 1440*l.*

It was inſiſted, that there ſhould be 6 *per cent.* on all the arrears ſince; there being no diſcretion in the court to abate the intereſt: in *Maſon* v. *Fauſſet*, Lord *Talbot* thought, that when the arrears of intereſt are computed ſince the reduction of intereſt upon a mortgage carrying 6 *per cent.* he could not make a variation in reſpect of future intereſt to be paid on that accumulated ſum; becauſe that intereſt is to enſue the principal: but Lord *Hardwicke* was afterward,

(q) In 1 Brown 144. Lord Thurlow ſaid, to exempt the perſonal, teſtator muſt ſhew his intent; it is not ſufficient to charge the real, but he muſt ſhew that his purpoſe is, that the perſonal ſhould not be applied. Ibid. 454. Lord Thurlow recognizes this doctrine, and lays down the rules which exempt the perſonal. 2 Atk. 624.

afterward, *4th March* 1742, of a different opinion, and held, that ſhould not be the rule; that the principal ſum ſhould carry the original intereſt: but the accumulated ſum ariſing after the reduction, ſhould carry leſs intereſt, upon the diſtinction that the making the intereſt principal by intervention of the court ſhould be conſidered as making intereſt principal by agreement of the parties; which if done after the ſtatute reducing the rate, that agreement could not make more than 5 *per cent.* But this is an accumulated ſum fixed and aſcertained by the report before the reduction of intereſt, which was not till 1712, therefore there is no diſcretion in the court, to vary from the legal intereſt it bore at the time.

LORD CHANCELLOR.

(r) If this inſtead of a covenant had been a bond with penalty, the penalty, being a debt at law, would affect the real eſtate. But it will depend on the will of Mr. *Langley*, whether the whole real eſtate is ſubject to payment of debts; for if it is, it will be affected by equitable as well as other debts. Therefore it muſt ſtand over to look into the will, whether the real is charged with payment of debts thereby: There are caſes which have gone a great way; and the court to attain payment of debts will certainly go as far as it can.

The court will go as far as it can, to attain payment of debts. Real eſtate where charged, affected by equitable as well as other debts.

The KING *verſus* Curtis, *Trinity Term* 1750. Caſe 197. *Exchequer.*

A *Diem clauſit extremum* having iſſued to inquire the day, year, and place of the death of *Curtis*; what goods, chattels, debts, *&c.* he had thereon; and to whoſe hands they afterward came, and now are in: what lands and tenements he had on his death; who has ſince received the rents and profits, and does now: and that the whole ſhould be extended and ſeiſed into the King's hands. There was a ſeiſure in conſequence thereof.

Diem clauſit extremum iſſued for a ſimple contract debt to the crown.

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Application was made by the creditors and adminiſtrators of *Curtis* to ſet aſide this writ, as iſſued improperly; for that the debt due from *Curtis* to the crown was by ſimple contract, and not on record at the time of his death; it not being a debt on record till the inquiſition taken after his death;

(r) 2 Vol. 514.

death; which ſhall not have relation to make it ſo in his life, and will not warrant this writ; which cannot iſſue for a ſimple contract due to the crown at his death. Till the act putting bonds on the foot of a debt on record (which was to facilitate the recovery of it, as then there would be ſufficient ground to award execution) the crown could not have done this upon a bond: then certainly not upon a ſimple contract, from which there is no lien on the real eſtate to affect it in the hands of heir, deviſee, or purchaſer; as it would, if it had been a debt on record at his death. As to the perſonal eſtate, though the aſſets are adminiſtered in paying judgments, this writ is to fetch all back, and would overturn any payments made by debtor of *Curtis* to his executor, although ſuch payments were good: and according to this a ſale in market *overt* will not affect the right of the crown, who may follow into the hands of a creditor, or of whoever bought up this perſonal eſtate before the inquiſition, and drive them to their remedy againſt the executor, who may be worth nothing. This matter was never yet determined: and the prerogative ſhould not be extended farther than the benefit of the public.

The *court* took time to conſider, and this term gave judgment, that the writ iſſued properly: but did not determine the points.

*Bunb. 315. Againſt the crown had been cited the *King* v. *Wilkinſon** ; whoſe eſtate had been attempted to be brought within the ſtatute 13 *Eliz. c.* 4. which the court there declared, they could not do, becauſe he was not an officer within that act.

Baron Clarke ſaid, it was not ſo: the queſtion there was, whether a man becoming a receiver, his eſtate was ſo bound from that inſtant, that notwithſtanding ſeveral *quietuſes* and ſettlements they would be all over-reached, and reſort might be to the lands in the firſt inſtance? † That the caſe was never determined: but no countenance was given to it, becauſe purchaſers might think from thoſe *quietuſes*, that they were ſafe.

† In Bunb. 317. Judgment for defendant.

Gibſon

Gibſon *verſus* Lord Montfort, *June* 25, 1750. Caſe 198.

Rogers *verſus* Gibſon.

MR. *Shepherd* by his will gave all ſuch worldly eſtate, as it pleaſed God to bleſs him with, as follows: All and ſingular his freehold, leaſehold, copyhold, and alſo perſonal eſtate of what kind ſoever to truſtees, their executors, adminiſtrators and aſſigns, in truſt to and for ſeveral uſes; to pay ſeveral reſpective annuities, ſums and legacies by and out of the produce of the perſonal eſtate; if that ſhould happen to be deficient, then to pay the ſame by and out of the rents, iſſues, and profits ariſing by the real eſtate: and as for and concerning all the reſt, reſidue and remainder of the real and perſonal eſtate of what nature and kind ſoever, after proviſion being made for the payment of the legacies, *&c.* he gives to ſuch child or children, as his daughter ſhould have lawfully begotten, whether male or female, equally to be divided between them; if his daughter ſhould die without ſuch iſſue of her body lawfully begotten, then to two other perſons equally to be divided between them ſhare and ſhare alike. In another clauſe in the will he directs and orders, that upon the death or deaths of all and every perſon or perſons, to whom annuities for their lives were given, ſuch annuities as ſhould fall in from time to time, ſhould go back to the reſidue of the real and perſonal eſtate, and go to thoſe in remainder over. By a codicil he adds, provided his daughter die without iſſue; but if ſhe ſhould leave a child or children, ſuch annuities as fell in ſhould be divided among them ſhare and ſhare alike. He executes another codicil, reciting that, whereas he had by his laſt will of ſuch a date given and deviſed to his executors a ſum of money in truſt for *A.* and another in truſt for *B.* he revokes thoſe legacies, and deſires, that writing ſhould be a further part of ſaid laſt will and teſtament. Before the laſt codicil he had made a purchaſe of ſome lands.

Two queſtions were now made, beſide what related to the copyhold. One concerning the ſurplus rents and profits of the real eſtate after ſatisfaction of the particular charges on it created by the will, till ſuch time as the perſon to whom he deviſed on contingency, *viz.* a child of the daughter, came *in eſſe*: whether they were to go either as

part

part of the reſidue to attend the ſeveral limitations of that reſidue, or to the firſt taker of that reſidue, or to the heir at law? the other queſtion was, whether the after purchaſed lands ſhould paſs by the will?

(486) It was inſiſted, the whole being given away, there can be no reſulting truſt for the heir: great pains being taken to prevent an inteſtacy as to any part. Though the heir wants not the intent of the teſtator, if it reſted on that alone, yet, when a queſtion is doubtful, what is compriſed in the reſidue, what the teſtator deſigned, is material in deciding it. This reſidue conſiſts of a compound fund of ſeveral ingredients In the clauſe of annuities falling in, the word *reſidue* cannot mean ſimply that eſtate, the teſtator poſſeſſed at his death; ſpeaking of what is ſuppoſed to have happened after his death; it being the reſidue of the profits out of which theſe annuities are to be paid. In other branches of the will he has induſtriouſly affected an accumulation of the produce of different parts of his eſtate; for in a legacy to a particular perſon he has taken care, the intereſt ſhould be accumulated from time to time; *a fortiori* his deſign was the ſame as to the reſidue intermediate. He conſidered his eſtate not as conſiſting of the inheritance excluſive of the rents and profits during the contingency. Deviſe of rents and profits gives the eſtate itſelf, *Co. Lit.* Had he ſaid ſo in terms, there would have been no doubt; and here are words ſufficient for that. Moſt caſes of accumulation depend on the particular circumſtances; as did *Hopkins* v. *Hopkins* and others, before his *Lordſhip*. It was ſometime, before ſuch a deviſe to a perſon not *in eſſe* was allowed; but now it is. It muſt be admitted, the eſtate in the mean time will deſcend: on the other hand it muſt be allowed, one may direct the profits for the perſon unborn, where he has deviſed his eſtate by way of truſt; becauſe that limitation muſt be within a life in being; and there is ſufficient to ſhew, that was his intent. *Reſidue* generally would not in caſe of real eſtate have the ſame conſtruction as of perſonal: in the latter it meaning every thing, however ariſing, as a lapſed legacy, or any thing not particularly mentioned, or given on contingency: not ſo as to real eſtate, as the intermediate profits of an eſtate to take effect on a future contingency would deſcend: but here the teſtator has ſhewn he intended to comprehend all the profits under the reſidue: and as the heir admits, that giving the perſonal eſtate gives the profits of it, by mixing both he ſhews his intent, the intermediate profits of the real ſhould go the ſame way.

Next,

Next, the after purchaſed lands paſs by the codicil; it being a republication, executed according to the ſtatute, and as a confirmation of the will. Both together make up a complete will, whether it takes away or alters part; and every codicil is ſuppoſed annexed to a will and part of it, though not actually faſtened thereto, as this in fact was found to have been at teſtator's death; who therefore ſubſtantially re-executed the will itſelf; and then it muſt be ſhewn, that it was in a different condition at the time of making; as where part of a will appeared to be ſtruck out; but not when done; for the court muſt take it to be as at that time. It is not eaſy to know the reaſon of the diſtinction between a deviſe of a real and perſonal eſtate, which (487) the teſtator had not at the making. In ſome books it ſeems to depend on the word *having* in the ſtatute of *H.* 8: but perhaps it may as well be from analogy to cuſtom. But if after the purchaſe he declares the former to be his will, he need not repeat the deviſe over again; and he has plainly done ſo by this. A codicil in its nature implies a ratification, ſo far as it does not vary: if it repeals the whole, it is not a codicil, but a new will. Whether he ſays *republiſh*, or recites the former will, or declares his intent it ſhould ſtand, it amounts to the ſame. It is not neceſſary he ſhould declare to witneſſes, it is his laſt will; nor even in the firſt will to tell the witneſſes he publiſhes it, if ſigned and ſealed: as was determined lately in *B. R.* on two caſes ſent out of this court, *Trimmer* v. *Jackſon*, and *Worwood* v. *Scot*, that delivery by teſtator as his act and deed is ſufficient. Notwithſtanding the ſtatute of frauds a will may be made, properly atteſted, giving real eſtate to ſuch uſes as contained in ſuch a ſettlement, though that ſettlement is not atteſted by three witneſſes, and it would paſs new purchaſed lands; for ſufficient certainty, by referring to ſomething certain. So if it is to ſuch uſes, as he ſhall declare on a particular occaſion, or as another ſhall appoint, though that is not atteſted by three; for any thing ſhewing his meaning with ſufficient certainty will do. This codicil is as much a part of the will, as if all the words were recited in it: nor can there be a ſtronger republication by a diſtinct inſtrument, unleſs he had ſaid, *I confirm*; and it is the ſame here, as if he had. In *Cart* v. *Cart*, a man created a term for years, ſettled it on truſtees for benefit of himſelf, and by will gave it to his ſon, making him executor: he renewed the leaſe ſeveral times, and died with the like leaſe in truſtees for him; but he wrote on the back of his will, that if his ſon ſhould be proſecuted by the government ſo as to incur a forfeiture, and be incapable of enjoying

joying the leaſe and being executor, he gave it to his other ſon and daughter. No forfeiture happened: the queſtion was, whether the ſon, to whom given by the will while it was another actual leaſe, ſhould be conſidered as deviſee of this leaſe at the time of the death; it being inſiſted that writing was a republication of the will: and of that opinion was his *Lordſhip:* that the words were ſufficient to take it in. There was a direction in the will, that the leaſe ſhould be renewed; which ſhewed he meant a renewed leaſe, and by this writing he conſidered it as his will, and the ſame as if he had recited his will. It was a republication; and it could paſs by the general words; his intent appearing that any renewed leaſe ſhould go; which ſhews, there need be no words of republication or confirmation, he conſidering it as his will.

(488) *For the heir at law.* Whatever is not given away, deſcends; the heir not being diſinherited by doubtful expreſſions. *Gardener* v. *Sheldon*, *Vau.* the ſame in uſes and truſts: as in feoffment to uſes for life or in tail, the fee reſults back. So in a truſt to ſell and pay the profits over at a particular time. Here is an apparent omiſſion to give the intermediate rents and profits; by a gift to one not *in eſſe* nothing paſſing immediately. It was formerly doubted, whether a deviſe to an infant *in ventre* was good at all; but of late it is allowed on the notion of a future deviſe. *Snow* v *Tucker*, 1 *Sid.* 153. yet mean time it deſcends. If this was a uſe, where would it be in the mean time? Not in abeyance; for that can be only by law for neceſſary purpoſes, not by act of the party. In *Hopkins* v. *Hopkins*, *Talbot*, notwithſtanding ſtrong words that it ſhould accumulate, yet it was held not diſpoſed of in the intermediate time, but reſulted to the heir; who wants not, claiming always in contradiction to the intent. Here is a deviſe not generally to the truſtees; for that might have admitted the conſtruction contended for: but it is deſcriptive of a chattel, not paſſing the inheritance to them, the words being only a deſcription of the land. Where an eſtate is given to truſtees for a particular purpoſe without going farther, it goes to heir at law as ſoon as the purpoſe is ſerved. This is to the truſtees for life only; the inheritance and legal eſtate paſſing to the perſons to take on contingency, and mean time deſcends; for *reſt* and *reſidue* will not take in theſe ſurplus profits. The whole accumulating profits of the perſonal will indeed go by this deviſe: but that ariſes from the ſenſe of the word *reſidue* applicable to perſonal; not ſo to real eſtate. A gift of a perſonal

perſonal chattel without limitation gives it abſolutely; to take away which, a limitation muſt be added: *vice verſa* in ſuch a gift of real, which is conſtrued only for life. Reſiduary legatee of perſonal will take a lapſed legacy: not ſo of the land, which would deſcend to the heir. *Wright* v. *Horn*, *C. B. Hil.* 10 *G.* 1. * and *Goodright* v. *Opie*, *B. R.* † Although there it was not *reſt and reſidue*, *but all my other lands and tenements.* Suppoſe a gift to *A.* for life, another part to *B.* for life, and the reſt to *C.* it is doubtful whether that would have the effect of *all my eſtate* ſo as to give the fee, as in *Eq. Ab.* 177. Theſe words therefore meant only all the other parts of his eſtate, not carrying the total intereſt as in the perſonal. He might indeed have given theſe accumulated profits to the child; but it is not ſaid ſo. A different conſtruction ariſes from his doing it in a caſe of leſs value, *viz.* that in the greater he did not intend it: and ſurely if ever favour was ſhewn to an heir, it ought in this caſe of an illegitimate daughter amply provided for.

* *Mod. Caſ.* 221. *cited by Viner as* 8 *and* 9 *Mod.* & *Forteſcue* 182. *Paſ.* 11 *G.* 1. *Wright* v. *Hall.*

† *Mod. Caſ.* 123.

As to the lands purchaſed after the will, the general words are indeed ſufficient to take them in, if they amount to republication: but they do not: the codicil relating only to particular parts of his perſonal eſtate, which he revokes, not confirming the will. If a codicil takes notice of the real eſtate, or ratifies a former will thereof; that is a republication: for it is in fact ingrafted in the codicil: but for that purpoſe it muſt relate to the real, not perſonal eſtate. As 1 *Rol. Ab.* 618, a writing, that *J. D.* ſhall be executor, is not ſuch a republication: and 2 *Ver.* 722. *Hutton* v. *Simpſon*, and *Cr. El.* 493, where annexing a codicil diſpoſing of perſonal eſtate was not ſufficient republication confirming the will as to the real. In *Martin* v. *Savage*, *Nov.* 22, 1740, his *Lordſhip* determined, that ſince the ſtatute, there could be no republication of a will of lands by parol declaration as to paſs after purchaſed lands. *Litton* v. Lady *Falkland*, 3 *C. R.* and *Acherly* v. *Vernon*, *Comyns* 381, and *Cholmondley* v. *Cholmondley*, on the late Lord's will, before Sir *Joſeph Jekyl*, *January* 21, 1733, where a codicil revoked a deviſe of houſe, garden, and eſtate at *Richmond*, directing it to be ſold, and the money ariſing to purchaſe freehold lands in *Cheſhire*, to the ſame uſes as directed by the will touching the reſidue of the perſonal eſtate: and it was held, that codicil did not paſs lands purchaſed after the will. In *Potter* v. *Potter*, *Eaſter Term*, Sir *John Strange* held a codicil well executed, though perhaps the will was not laid on the table, nor executed

Ante. May 7.

executed in the preſence of the will, yet it extended to lands purchaſed after the will and before the codicil, becauſe it was an expreſs ratification of the will: but he ſaid, (though that indeed was not the queſtion there in judgment) that if the codicil related only to perſonal eſtate, it would not have done.

LORD CHANCELLOR.

If the teſtator had ſtudied to lay a foundation for all the queſtions that could ariſe on ſuch an eſtate in a court of equity, he has done it effectually; for there is hardly a point upon limitations over or reſulting truſts in this court but there is a foundation for it in this will ſome time or other. But it is not neceſſary to determine all at preſent: the queſtions now are three.

Truſt of copyhold may be deviſed without ſurrender to uſe of the will.

(r) The firſt is not ſo properly a queſtion as matter of inquiry, relating to the copyhold eſtate. As to which, all ſuch as he had the truſt of the inheritance in himſelf, though the legal eſtate in names of other perſons, will paſs; becauſe it has been determined, it is not neceſſary there ſhould be a ſurrrender to uſe of the will of ſuch truſt-lands; for not having the legal eſtate, he could not ſurrender. (s) But that muſt be in a caſe where either by plain words or neceſſary intent it appears, he intended to deviſe his copyhold lands: and here are expreſs words deviſing them to truſtees. But if there are any copyhold, whereof he had the legal eſtate, and did not ſurrender to uſe of the will, conſidering the nature of this deviſe they will not paſs, but deſcend to heir at law. The maſter therefore muſt inquire if there are any ſuch.

Not where teſtator had the legal eſtate.

(490)

The next queſtion is, as to the ſurplus profits; whether they are included, and to go by the deviſe of the reſidue in any way, or to be conſidered as part of the real eſtate undiſpoſed of, and go to the heir at law; on which point the only queſtion to determine is, whether the heir can take? For as to the ſubſequent queſtion, as between any child of the daughter and the remainders over if ſhe dies without iſſue, I ſhall reſerve it. It is truly ſaid for the heir, he wants not teſtator's intent, claiming contrary thereto as a ſtrict legal right; and it makes no difference whether a legal or equitable right on a reſulting truſt; the heir will carry it away, if not ſufficiently deviſed. It is rightly

Deviſe in truſt for child of his daughter, if ſhe dies without iſſue, over; the intermediate profits till

(a) Ante 121, 225. (s) Brown. 482.

rightly admitted, that all the ſurplus profits and intereſt of the perſonal eſtate will paſs by the reſiduary deviſe; for there is no caſe, where the reſidue of the perſonal is diſpoſed of, where the court has not held it to extend to any profits ariſing. It is admitted alſo, that he might by expreſs words have given the ſurplus rents and profits, that ſhould accrue, before the daughter had a child, or died without iſſue, away either to ſuch child when born, or the perſon to take when ſhe died without iſſue. It is plain he might; becauſe it is to determine in the compaſs of a life; which is a proper time and a reſtriction, within which ſuch a contingency can happen. The queſtion then is, whether by expreſs words or plain neceſſary implication of the conſtruction of this will they are given away from the heir at law? and I am of opinion, that by plain neceſſary conſtruction they are. It is pretty hard to ſay, that in any caſe, where one deviſes all the reſt and reſidue of his real eſtate, the heir ſhould be enabled to claim any thing out of it; for how can he claim or take theſe intermediate profits? He muſt claim as part of the real eſtate undiſpoſed, not by any particular truſt: which was the caſe of Lord *Hertford* and Lady *Carteret*, commonly called Lord *Weymouth*'s caſe. What has the teſtator done? The order of the words and clauſes is not material in reſpect of the formality, unleſs they put a different conſtruction on the will. He has plainly declared an intent to diſpoſe of his whole eſtate. Such a deſign was never ſhewn more plainly. Conſider, what is compriſed in the deviſe to the truſtees. It is objected, that it is only a deviſe to them for life; but that cannot be; as that might determine, before the change determined. But conſidering it as a chattel-intereſt according to the caſe in *Coke*'s reports till theſe charges ſatisfied, and no longer; then the deviſe to the children of the daughter, or for want of iſſue over, is not a deviſe of the truſt, but of the legal eſtate in remainder after theſe charges ſatisfied, and the determination of the chattel-intereſt: it cannot be ſupported as a contingent remainder; becauſe that limitation cannot be after a term for years or chattel-intereſt; which would be a good point for the heir at law, if that could be maintained. Whether it may be conſidered as an executory deviſe is another point. But I am of opinion, this muſt be conſidered as a truſt throughout, and that the whole legal eſtate of the inheritance is deviſed to theſe truſtees. (t) It has been often determined, that in deviſe to truſtees it is not neceſſary, the word

till the contingency happens accumulate, and deſcend to the heir.

(491)

truſtees have a fee, where purpoſes of the

(t) 3 Burr, 1686.

truſt cannot otherwiſe be anſwered. *Eq. Ab.*

word *heirs* ſhould be inſerted to carry the fee at law; for if the purpoſes of the truſt cannot be ſatisfied without having a fee, courts of law will ſo conſtrue it: as in *Shaw* v. *Weigh*, and ſeveral other caſes. Here are purpoſes to be anſwered, which by poſſibility (and that is ſufficient) cannot be anſwered, without the truſtees having a fee: *viz.* the payment of ſeveral annuities and large pecuniary legacies, if the perſonal eſtate is deficient, which will probably be the caſe. Then how is the reſt to be raiſed? Barely by the annual rents and profits? It muſt be ſo, if it is a chattel-intereſt; for then it cannot be taken out of the eſtate by anticipation: but that cannot be here; for if theſe pecuniary legacies are not paid out of the perſonal, the real eſtate muſt be ſold to ſatisfy them; for ſeveral of them are to be paid within a year after teſtator's death, and cannot therefore be paid by annual perception. Then conſider the word *ariſing*: it is never held to reſtrain to the annual rents and profits: which words include always the land, *Ivy* v. *Gilbert*, 2 *Wil.* 13, unleſs ſomething more, as there. This then is a purpoſe, which it is impoſſible to ſerve, unleſs the truſtees have the inheritance; for if they are to ſell a fee, they muſt have a fee: nor will the court ſplit the deviſe. The objection, that this is deſcriptive of a chattel, *&c.* might have weight, if there was not a perſonal eſtate alſo in this deviſe to truſtees. The word *executors* therefore properly relate to the leaſehold, and *aſſigns* to both. This then is a truſt throughout in this court; and if the daughter has a child born, or dies without iſſue, and the eſtate goes over, they muſt come for a conveyance of the legal eſtate from the truſtees. Then conſider to what it extends: does it extend only to the lands and groſs funds of the real eſtate, or alſo compriſe the ſurplus profits thereof intermediate between death of teſtator and birth of a child, or dying without iſſue? I think the latter. If it had been ſaid *after payment*, it might have been contended for on the words *after all theſe payments determined*; though perhaps that would be only playing on the words: but this is after *proviſion being made*, *&c.* after which who has teſtator directed ſhall have all the reſt, *&c.*? Thoſe to whom it is given on contingency: *Stephens* v. *Stephens* is material to the conſtruction of thoſe words *reſt* and *reſidue*. Lord *King* there ſent a more extenſive caſe than ever was ſent into a court of law. I have been informed, that Lord *Talbot* afterward expreſsly declared, he was of the ſame opinion as the judges: according to the nature of executory deviſe the eſtate ſhould deſcend in mean time to the heir at law, and paſs out of him

2 Will. 13.

Tal. 228.

him on the happening of the contingency, on which the executory deviſe was to take place. The caſe is printed very correctly; and in a court of law it is determined, that where there is an executory deviſe in a will, *all the reſt and reſidue* of an eſtate real and perſonal would alſo take in the intermediate profits of the real, ſo deviſed on contingency, which would otherwiſe go to the heir at law; which goes a very great way, and is a ſtrong authority as to the poſſibility, that ſuch profits may be taken in by thoſe general words, and that in a court of law: and as it is admitted, the teſtator may by expreſs words do this, I do not ſee a material difference between the two caſes, unleſs that it is more probable, where it is a gift to a perſon in being, than where to one not *in eſſe*: but conſidering the care the teſtator has taken to accumulate in this caſe, it is probable, he meant it, as in *Stephens* v. *Stephens*. But the caſe does not reſt on this: though that is ſufficient. There are other things plainly determining this queſtion. I obſerved before, that as to the ſurplus intereſt and profits of the perſonal eſtate, they are admitted to paſs; and both real and perſonal being compriſed in the ſame ſweeping clauſe, is a ſtrong argument againſt a reſulting truſt to the heir at law; on which Lord *King* laid very great weight in *Rogers* v. *Rogers*. Next what ſenſe does the clauſe convey, by which he has directed the annuities to fall in? which he takes up in his codicil; recollecting that, as it ſtood, his daughter might be excluded therefrom. The annuities were to be paid only out of the rents and profits of the real ſo far as the perſonal was deficient: that was part therefore of the rents and profits of the real taken annually out of it to pay them: the meaning was, that thoſe annuities, which were part of the rents and profits of the eſtate, as the lives determined, ſhould go back to the reſidue, which is a plain conſtruction put by himſelf on the words *reſt and reſidue*: *Chapman* v. *Bliſſet* before Lord *Talbot*, is a full authority to ſupport the legality of this bequeſt; though indeed rents and profits were mentioned there. Nor is *Hopkins* v. *Hopkins* an objection againſt this: the court held there, that the ſurplus after ſatisfying the charges ſhould go to the heir; but that was, becauſe the court was of opinion, they were undiſpoſed of. On the whole therefore, I am of opinion they muſt be received by the truſtees, accumulated, and laid up. Then a queſtion ariſes, for whoſe benefit; which will be between the children of the daughter, if any, and thoſe to take remainder if ſhe dies without iſſue, and muſt be reſerved till after the happening of the contingency. The teſtator's being

Where on executory deviſe all reſt and reſidue include intermediate profits.

(492)

Tal. 145.

Tal. 44.

ſenſible of his miſtake, and inſerting the children of his daughter before thoſe in remainder, may make a ſtrong caſe for them: which was the queſtion upon which Lord *Harcourt* and Lord *Cowper* differed in *Chapman* v. *Bliſſet:* but there is no occaſion to determine that; for as to the heir at law none can deſcend.

Where a codicil is a republication ſo as to paſs land purchaſed after the will. If the codicil related only to perſonal eſtate. Q?

As to the laſt queſtion of the after-purchaſed eſtate; which was not, nor could be, compriſed in the deviſe, as it ſtood originally; the queſtion is, whether the codicil amounts to a republication of the will? (u) The codicil is executed accordingly to the ſtatute; but it is truly inſiſted upon, that it relates only to two perſonal legacies. Several caſes have been, where it was determined, that the execution of a codicil according to the ſtatutes of frauds ſhall amount to a republication of the will, ſo as to make the lands purchaſed after the will to paſs. The laſt was *Acherly* v. *Vernon*, where the Lords took the opinion of the (493) Judges, who all held the codicil a republication ſo as to make the fee-farm rents paſs. The difference taken is, that there the codicil related to real eſtate, this merely to perſonal; and that though executed according to the ſtatute, that was unneceſſary; nor had he real eſtate under contemplation at that time. If that is determined and eſtabliſhed, the court ought not to go further. But as to *Litton* v. Lady *Falkland*, it is difficult to lay weight on the report of it; for certainly one thing is mentioned there as a reaſon for the codicil's not being a ſufficient re-execution of the will, which is not law now; being directly contrary to the reſolution in *Acherly* v. *Vernon*. It is ſaid alſo, that in *Cholmondeley* v. *Cholmondeley* it was determined, that the execution of a codicil relating to perſonal eſtate was not ſufficient; and that ſuch was the opinion of the *Maſter of the Rolls* in *Potter* v. *Potter*, though not ſtrictly the determination there: but in *Acherly* v. *Vernon* there is given an opinion of the judges, which ſeems to combat that notion, *viz.* that the codicil was incorporated with the will, which makes it a republication; and that reaſon falls in with the argument for the plaintiff the deviſee; for then every codicil executed according to the ſtatute of frauds, relating to whatever part of the eſtate, according to that general doctrine would be a republication of the will, and would be contrary to the doctrine cited out of *Litton*'s caſe, and *Cholmondeley*'s. But it is admitted for the heir, that though a codicil only to a perſonal eſtate, yet if there is a general clauſe

(u) Ante, 443. 2 Vol. 622.

clauſe of confirmation of the will, that will make that codicil duly executed amount to a republication; becauſe it is the ſame, as if he had republiſhed every deviſe in the will over again. In the preſent codicil indeed there are not the words *I confirm my will:* but it is *I deſire, &c.* between which and an actual confirmation there ſeems very little diſtinction. This indeed will make every codicil, if executed according to the ſtatute of frauds, do, though it relates only to perſonal eſtate; for a codicil is undoubtedly a further part of the laſt will whether ſaid ſo or not; which indeed combats with the doctrine in thoſe caſes, and what was ſaid by the *Maſter of the Rolls*; and if that has been ſettled and determined, I ſhould be willing to ſettle it there, and not carry it further: and the boundaries are ſo very nice, it is difficult to diſtinguiſh one from the other. But on this point I will not give a preſent opinion; but will firſt ſearch the *Regiſter* for *Litton*'s caſe, and deſire ſome account of *Cholmondeley*'s. As to what was ſaid relating to the annexation of the will, an inquiry would not bind: nor do I know, it will vary the caſe, unleſs annexed at the time of the execution.

June 20th the plaintiff's counſel informed the court, that there had been ſince diſcovered a contract for theſe very lands before the firſt codicil, though not executed till after it: and by the firſt they indiſputably paſs; that relating to real eſtate. (494)

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This not being proved in the cauſe, nor the time for performance, the proper way will be to direct the Maſter to inquire into the ſaid contract, and when performed.

Articles for purchaſe before a codicil to be executed after.

The contract being read *de bene eſſe*, *Lord Chancellor* ſaid, it was before the firſt codicil, and went a great way to end the queſtion. But the firſt codicil came before the time for execution of theſe articles, which was the only difficulty; for though things agreed on are looked upon as executed here, yet this is not ſuch an agreement as could be executed at that time; the time for executing not being come: but that ſeems too nice; for in a contract for lands, if the party dies, before the time for making the conveyance comes, and without a will, the court conſiders it for the benefit of the heir at law, that the lands ſhould be purchaſed for him: and if ſo, why not for a deviſee? Let the Maſter inquire, whether there were any, and what articles

ticles or agreement in writing for purchaſe of theſe lands before the making the conveyance thereof to teſtator; what were the contents and time of execution of ſuch articles, and reſerve directions touching them. *Litton* v. Lady *Falkland* is very looſe and imperfectly reported in 3 *C. Rep. Octavo.* It is put there on the annexation, which cannot make a difference; for all codicils are by law faſtened to the will: ſo that was a very trifling point, and *Cholmondeley* v. *Cholmondeley* muſt have been a cauſe heard by conſent, as it was before term.

The counſel for the heir ſeemed to give it up; as in *Potter* v. *Potter*, the *Maſter of the Rolls*, and all the bar thought, that if the agreement had been in writing, it would have relation.

Caſe 199. Baxter *verſus* Knollys, *June* 27, 1750.

THE bill ſought a partition of tithes and caſual profits in the iſle of *Wight*.

Demurrer to Bill for partition of tithes overruled.

Demurrer thereto: and 5 *Co.* cited, that there were no caſual profits, and that it may be divided by writ of partition.

LORD CHANCELLOR.

(495) An ejectment will lie of tithes; of which the execution is a writ of poſſeſſion: and the ſheriff may do as much on partition as on a writ of poſſeſſion on ejectment. This is not caſual, whether tithes will riſe or not. I do not doubt, but this court can divide them, as it may ſeveral things, which cannot at law. Over-rule the demurrer therefore.

Caſe 200. Sands *verſus* Sands, *June* 28, 1750.

Leave of the court before new ejectment brought.

A Bill was retained for a year with liberty to bring ejectment; verdict given for defendant. *Lord C. Baron Parker*, before whom it was tried, certified, that, though he did not think it a verdict againſt evidence, the weight of the evidence was with plaintiff. On application by plaintiff for leave to bring a new ejectment, it was granted: and verdict obtained for plaintiff, who ſet down the

the cauſe to be heard. Defendant let plaintiff get poſſeſſion, and brought a new ejectment without leave, and moves to put off the hearing, becauſe of the pendency of his ejectment.

LORD CHANCELLOR.

It is quite new to me, that either party ſhould after the trial bring a new ejectment without leave of the court; the courſe of the court being that either party ſhould firſt apply; otherwiſe the ſuit might be protracted as long as they pleaſed: the plaintiff might *toties quoties* prevent diſmiſſion of his own bill, or the defendant the hearing the equity reſerved; for the court would not go on while an ejectment was depending. Yet as there is verdict againſt verdict, will it not be equally expeditious for plaintiff to let defendant go on with his ejectment? Therefore excuſe irregularity.

Aſtley *verſus* Powis, *June* 30, 1750. Caſe 201.

THIS cauſe coming on again, the will appeared to be no ſpecific deviſe of the real eſtate; but only money-legacies and annuities, and then all his manors, *&c.* he gives to *E. B.* his heirs and aſſigns for ever; making him executor and reſiduary legatee after all juſt debts are paid and ſatisfied. Ante, June 23.

LORD CHANCELLOR. (496)

This would charge the real eſtate with the legacies, if the perſonal was deficient; for it does not give a ſpecific deviſe of any part of the real eſtate, but by way of reſidue after the annuities, *&c.* which ſhews, what was before given was out of either of thoſe funds: and his charging the legacies on the real eſtate ſhews an intent, that debts ſhould be paid out of either fund; for legacies are to be paid ſubſequent to debts; and all this is one clauſe. Several caſes have been where in one clauſe both ſhould be taken as executor, and conſequently both ſhould be liable to debts: ſo that the proper conſtruction is to take theſe words *after debts paid and ſatisfied*, as relative to and running over the whole ſentence; which clearly ſhews the real eſtate is chargeable.

Real eſtate where charged with debts by a will. Intereſt on the accumulated ſum reported due, being a debt by the will. But only on the principal if it ſtood on the report only.

Then

Then the jury, before whom the queſtion was, whether there was proof or preſumption of payment from the length of time, having found that no part of this ſum was paid, and that there was no lacheſs in plaintiff in not receiving the money, there is no ground to ſay, that by reaſon of the length of time, which the jury have held excuſed as to the principal, the intereſt ſhould not be paid.

Decree not equal to judgment to affect lands; tho' it is in courſe of adminiſtration.

Intereſt by courſe of the court diſcretionary, and computed at 5 from 12 *Anne*, on the ſum turned into principal by courſe of the court; but 6 on the principal ſum due by covenant.

(x) The queſtion is, at what rate the intereſt ſhall be computed? The report being confirmed, the whole ſum ought to carry intereſt. I clearly thought, that if it ſtood barely on the report without more, the turning into principal being only the courſe of the court, and being a perſonal decree againſt the teſtator in his life, and the preſent bill being to affect the real eſtate, if no charge thereon the real eſtate could not be charged with intereſt of that whole ſum; (y) becauſe a decree of this court is not equal to a judgment at law to affect lands, though it is in a courſe of adminiſtration; and therefore the lands could be affected only by the covenant in the articles; in an action on which covenant the intereſt would be computed only on the principal ſum; and then the 6 *per cent.* would be carried on only on the 1000*l.* no farther, not on the 440*l.* for the intereſt could be computed only by force of the covenant for him and his heirs. But now it muſt be conſidered as a debt by force of his will, therefore they are intitled to have intereſt on the accumulated ſum. As to what rate; it being to be computed not by agreement of parties, but by courſe of the court, ſuch intereſt is always in the diſcretion of the court; and there are ſeveral inſtances where it has been done. At the time of the covenant intereſt was at 6 *per cent.* and on the covenant, the court cannot vary that. All theſe acts of parliament varying intereſt have not extended to antecedent contracts, only to ſubſequent. Then on the principal ſum intereſt will be carried at 6 on the 1000*l.* and alſo on the whole ſum to the time of intereſt being altered by 12 *Anne*; for the report was in (497) 1694, when the common rate of intereſt was ſo. But when intereſt was reduced by that act of parliament to 5*l.* and as that rate of intereſt on ſuch accumulated ſum, being turned into principal not by agreement but by courſe of the court only, is diſcretionary in the court, it will be computed at 6 on the 1000*l.* principal (for that I cannot alter) but only at 5 on the 440*l.*

Doddington

(x) 1 Wms. 653. 2 Vol. 471. (y) Talb. 222, 217. 2 Wms. 621.

Doddington *verſus* Hallet, *July* 2, 1750. Caſe 202.

Partnerſhip.

Part-owners in a ſhip impower one of them to contract for building, &c. on his death they have a lien on his ſhare for the charges.

AN agreement was entered into between the plaintiffs and *Thomas Hall* impowering him to contract and agree for the building a ſhip for them for the ſervice of the *Eaſt India Company*, and for the fitting out, managing, and victualling her; with a covenant (among which *Thomas Hall* was one of the ſubſcribers) to pay proportional ſhares according to the ſeveral parts of the money, and all the charges and diſburſements in equipping, *&c.*

Thomas Hall dying inteſtate, the part-owners brought this bill againſt his repreſentative, that they might have a ſpecific lien, upon what ſhould be due to *Thomas Hall* for his ſhare, for the money the plaintiffs had paid to the tradeſmen in fitting out, *&c.* the ſhip, and that the adminiſtrator of *Thomas Hall* ſhould not run away with it as part of his general aſſets for all the creditors; citing *Skip* v. *Harwood* *, where *his Lordſhip* determined, that the plaintiff had a lien on the partnerſhip-eſtate in reſpect of the balance, that ſhould come out due to him on the partnerſhip account; and that no ſeparate creditor of any one partner by any aſſignment or execution could be intitled to more than the perſon in whoſe place he ſtood; but could only have ſuch, as was his debtor's ſhare, after the other partner was ſatisfied: which was founded on *Heydon* v. *Heydon*, 1 *Sal.* 392. 1 *Sho.* 173.

* Ante, May 1749.

LORD CHANCELLOR

This *prima facie* is like *Ryal* v. *Rowes*; † where the Judges, who aſſiſted me, determined; that if the money was advanced by way of a loan for a partnerſhip-matter, there ſhould be a lien for that.

† Ante, January 27, 1749-50.

For defendant. The ſelling and negotiating ſhares of ſhips is as common as of lands; and the perſon is conſidered as having a diſtinct property, as ſoon as he has got a bill of ſale; and that property may be marketed: although by taking that ſhare he does not involve himſelf with what went before: ſo that an aſſignee of a ſhare in a ſhip is intitled, abſtracted from any other account between the part-owners; having the legal property by the bill of ſale, which cannot be taken away by ſuch a lien, as now is inſiſted on. He might bring *trover*; againſt which no defence could be ſet

ſet up by ſuch a lien; much leſs could *trover* be maintained thereon againſt ſuch aſſignee having the legal property. Otherwiſe it would be laying an embargo on the negociation of ſuch ſhares of ſhips; and it would be dangerous to trade, if ſuch aſſignments could not be without ſubjecting the purchaſer to an antecedent account. This agreement is diſtinguiſhable from that of a partnerſhip, in which each partner is liable *in ſolido* on account of the tranſaction, the intereſt being joint. This is a covenant ſeverally, not jointly; there being an expreſs proviſion to prevent being accountable in any other way. It is a diſtinct, undivided intereſt; ſuch tenants are in common; not liable *in ſolido:* and tenants in common of ſhares in ſhips are not to be put on the foot of a partnerſhip in trade, which is of a fluctuating ſtock.

LORD CHANCELLOR.

No purchaſer or aſſignee of any ſhare of this ſhip is now before me: but merely the repreſentative of *Thomas Hall*, who was part-owner with others in the trade of this ſhip: and his repreſentative is juſt in the ſame caſe as he would be himſelf; and theſe general creditors are in the ſame caſe; having no aſſignment or ſpecific lien in his ſhare in the ſhip: and the rule of determination muſt be exactly the ſame, as if *Thomas Hall* himſelf had been before the court, and an account prayed againſt him. It muſt be admitted, the ſhip may be the ſubject of partnerſhip as well as any thing elſe; the uſe and earnings thereof being proper ſubject of trade, and the letting a ſhip to freight as much a trade as any other. Then it appears plainly to be a partnerſhip among them, and the ſhip itſelf to be part of the ſubject thereof, which was to be let to freight to the company; it being their method of trading. The foundation of this partnerſhip-ſtock is the ſhip itſelf, which muſt be employed, and the earnings and profits to ariſe. Undoubtedly all theſe perſons ſubject to this agreement are liable *in ſolido* to the tradeſmen who fitted it out; and this agreement for proportional ſhares is as between themſelves; which is the caſe of all partnerſhips: but as to all perſons furniſhing goods or merchandiſe, or employed in work, each are liable *in ſolido*. So it was in the inſtance of the brewhouſe in *Harwood*'s caſe: if it had been agreed, that that brewhouſe ſhould be part of the partnerſhip-ſtock and effects (which often happens to be ſo) the leaſe of the brewhouſe being uſed in the partnerſhip-trade, if workmen do work

work on the brewhouſe, every partner would be liable to that, as that work was done on their property; and that brewhouſe muſt be brought into the partnerſhip-account; and if more was due to one partner than another, all the ſhare of the partnerſhip-ſtock, conſiſting of the leaſe of the brewhouſe as well as the other effects, are liable to that account; (z) for in all partnerſhips, where more money is advanced by one partner, or even lent for a partnerſhip-account and trade, the ſhare muſt be conſidered as liable; for nothing muſt be divided as the ſhare of the partner, but what is coming clear on the balance of the account; for when the final account comes to be made up, every thing which is the ſubject-matter thereof, muſt be valued. The defendant's counſel have been forced to reſort to the caſe of an aſſignment of a ſhare for a valuable conſideration; which not being the caſe, I will not now determine; becauſe that is to be governed by the courſe of trade. If it ſtood on the head of general equity, I ſhould be of opinion, if ſuch a purchaſer had notice of the partnerſhip, he would be ſubject to it; and ſhould not doubt granting an injunction to that action of *trover:* if he had not notice, it is another thing, and a ſtrong caſe for that purchaſer; becauſe he would have gained the legal intereſt: but if by the courſe of trade it is otherwiſe, that will prevail, and govern in this caſe: and the court will never extend a partnerſhip of this kind to affect purchaſers, beyond what the courſe of trade will do, which is to govern in mercantile matters. The court always endeavours to bring theſe caſes within ſuch rules; for the conſequence would be, if that ſhould not be the rule, the ſhares *Thomas Hall* had, according to this doctrine would be liable to all the other creditors, together with the preſent plaintiffs in a courſe of adminiſtration: ſo that the plaintiffs would be liable to pay the tradeſmen out of their own pocket (which they are immediately) and the other creditors would run away with what the plaintiffs laid out and expended; which the court would avoid and prevent; always labouring to do that, ſo as always to decree a partnerſhip for that purpoſe. As in *Downham* v. *Mathews*,* *Lord Macclesfield* decreed a partnerſhip after a man's death, which would hardly have been decreed in his life; becauſe otherwiſe the other creditors would run away with what was expended. What therefore

The clear balance only to be divided as a partner's ſhare.

Where a ſhare is aſſigned for valuable conſideration without notice Q. it depending on courſe of trade, which governs in mercantile matters.

* P. C. 580.

(z) Bankrupts portions paying different proportions towards the debts, ſhall have but one allowance, which ſhall be divided in the proportions their eſtates paid. 1 Brown, 453.

fore ſhall be due on that account to *Thomas Hall*'s ſhare, muſt be liable to this payment to the tradeſmen: if any ſurplus remains, that will be to defendant the adminiſtrator, as part of the general aſſets: the plaintiffs having a ſpecific lien on ſuch ſhare for what they have paid, or are liable to pay to the tradeſmen for building and equipping the ſhip.

Caſe 203. Lypet *verſus* Carter, *July* 9, 1750.

At the Rolls.

(500) Deviſe of 100*l.* to a daughter, to be paid by executor in a month after death of the widow, to whom the real eſtate was deviſed for life, and afterward to his ſon, the executor in fee; appointing two truſtees or overſeers to ſee the will performed. On deficiency of aſſets, the real charg with the 100*l.*

(a) TESTATOR in the beginning of his will ſays, As to my worldly eſtate I diſpoſe of as follows: gives 100*l* to his daughter *Suſan*, which he directs to be paid by his executor to her ſeparate uſe within a month after the deceaſe of his widow, to whom he deviſes the real eſtate he had, (deſcribing where it lay), and alſo the uſe of his houſehold goods, furniture, and ſtock in trade, during life; and after her deceaſe to his ſon *John Carter*, his heirs and aſſigns for ever: appoints two truſtees and overſeers of his will, and deſires them to ſee it duly performed: all the reſt and reſidue of his goods, chattels, and perſonal eſtate not before diſpoſed of, he gives to his ſon *John Carter*; making him executor.

He was the only ſon and heir at law; he renounced; and adminiſtration with the will annexed was taken by *Suſan*; who brought this bill againſt him upon the perſonal eſtate's being admitted inſufficient to anſwer the charge: and the queſtion was, whether from any part of the will the court was warranted in conſtruing thoſe lands, deviſed to the defendant, in any reſpect ſubject or auxiliary to the payment of plaintiff's legacy?

Sir *John Strange:* The court in queſtions of this nature has gone a great way in endeavouring to perform the will; and though this is not the caſe of a debt claimed, yet it is what is ſaid in *Peer Will.* to be a favourable caſe; being a portion to a child equally intitled to a proviſion by a father: and on the whole he ſeems to have intended to provide for her:

(a) Prec. Chan. 449.

her: but foreſeeing that this could not be raiſed for her benefit immediately after his death, as that would break in on the proviſion firſt deſigned for the wife, he poſtponed the payment, till the fund came into poſſeſſion of the ſon, who was to pay it, by death of the mother: ſo that the plaintiff ſhould in all events have this 100*l.* yet not till the ſon was in a capacity to bear it. Then ſee from the caſes cited, whether they are not as ſtrong as the preſent. Firſt *Cloudeſly* v. *Pelham*, where there is not one circumſtance, from whence an intent of the teſtator to charge the real eſtate could be inferred, which does not occur here: and the court ſeemed to take that ſtep, though they thought the payment of debts was deſigned to come only out of the perſonal eſtate: yet that the executor ſhould not go away without doing juſtice to the party, the real as well as perſonal ſhould be ſold for payment of debts; which ſeems ſtronger than this. Next *Alcock* v. *Sparrowhawk*, which ſeems to tally with the preſent: the introductory words there are the ſame as in this; but a diſtinction is endeavoured, from this will's not being imperative on the executor to ſee the will performed, but on perſons the law can take no notice of as having any intereſt as to the management of the eſtate: but that makes no difference as to the intent of teſtator; for in a will deſiring every part of it to be performed punctually, it is not material, whether that deſire is to executors or to third perſons to interpoſe and ſee it carried on. Another caſe was *Aſtley* v. *Powis*, where the deviſe was all in one clauſe. *Davis* v. *Gardner*, 2 *Wil.* 189. is not an authority to the preſent: on the whole then it ſeems to be his intent to provide effectually for every branch of his family; for if this is not the conſtruction, it is admitted, his daughter *Suſan* muſt go without a proviſion.

1 Ver. 411.

2 Ver. 223.

Ante, June 30, 1750.

Seed *verſus* Bradford, *July* 10, 1750. Caſe 204.

Father, having a legacy left to his daughter, gives her more on her marriage; on acquieſcence during his life, the legacy not to be demanded.

(b) BILL by plaintiff, adminiſtrator to his wife, one of the daughters of *William Bradford*; which daughter was intitled to a fifth part of a legacy of 520*l.* left to her and her four ſiſters by the will of *Thomas Tindal* their grandfather.

The caſe, by which the plaintiff attempted to bring this 520*l.* home to the hands of *Bradford*, was this: *Tindal* made the wife of *Bradford* executrix. *Bradford* as her huſband poſſeſſed himſelf of the perſonal eſtate of *Tindal*; mixed

(b) 2 Vern. 484. 3 Atk. 76.

mixed the effects of it with his own; applied them to his own buſineſs; and continued ſo till his death. In 1740 there was a treaty for the marriage of the plaintiff with one of his daughters; upon which *Bradford* was to give 400*l.* as a marriage-portion, as it was ſworn by plaintiff's father, one of the parties to the agreement. On the wedding-day *Bradford* went up and fetched 400*l.* which was put by for the huſband's uſe; one witneſs ſwearing that *Bradford* ſaid, "there is the money, but that is not all;" another, that he ſaid, "there is, what I give my daughter, but that is not all;" and both added, "or words to that effect."

It appeared, the daughter was privy to the right ſhe had to this fifth part: it did not appear (but rather the contrary) that her huſband knew of it at that time; but he knew of it a year after the marriage: yet never made a demand of it in life of his wife, who died in 1742, nor in life of *Bradford*, who died in 1746.

For defendant was cited *Wood* v. *Brian*, 4 *March* 1742; where adminiſtration was granted to a man during minority of his daughter, who was intitled under the will of her grandmother to 600*l.* as it was ſtated in the cauſe, though no account was ever made up: the daughter was afterward married to the plaintiff; her father agreed to give, and paid 800*l.* portion, and lived ſix years afterward, without any demand by the huſband, who after his death brought the bill againſt his repreſentative for account of the perſonal eſtate of the grandmother come to his hands: and *Lord Chancellor* would not direct the account.

(502) *Sir John Strange.*

As the plaintiff knew of this right in his wife, there is no reaſon why he ſhould not have made this demand during all the time the father-in-law lived after death of the wife, inſtead of lying by till after the death of him who was party to the tranſaction, and might have given ſome account of it, if called on. To be ſure in caſes of this nature there is no occaſion for an expreſs ſtipulation, that the 400*l.* was given in full ſatisfaction of what came to the parents hands belonging to the child, and that he does not give it abſolutely out of his own pocket: but every caſe of this kind muſt be taken with the circumſtances; upon which the court goes, to ſee whether from the nature of the tranſaction and demand, it is not implied, that the money, thus given in the lump, included what the father gave

gave by bounty, and alſo what came to his hands as belonging to the child. That is the natural tranſaction; and otherwiſe the court muſt ſuppoſe, he intended to give the 400*l.* out of his own pocket, and ſuffer himſelf and his wife to remain ſtill liable to that demand and intereſt. The caſe cited ſeems not to differ materially from this: the court there conſidered it as an implied ſatisfaction, though in the tranſaction no notice was taken of it one way or other; it not being natural to imagine he would give 800*l.* out of his own pocket, and leave himſelf debtor to her for the produce of the perſonal eſtate come to his hands, for which he was accountable. The preſent caſe is ſtronger; for here is a certain ſum: it is more natural to conſtrue the 400*l.* an implied ſatisfaction of 104*l.* the fifth part of a legacy of 520*l.* than there the 800*l.* a ſatisfaction for an unliquidated ſum of 600*l.* which was only gueſſed at. The only difference is, there the father was adminiſtrator in his own right; here it was in right of the wife, executrix of the perſon who left the legacy: but all theſe effects coming to his hands, and being blended with his own, he muſt be conſidered as the father in that caſe, and as truſtees for plaintiff's wife. All the other daughters were advanced in the ſame way by portions, given by him in his life; and never thought they were intitled to their ſhare of that legacy beſide: although they by their anſwer claim it, if the court ſhould be of that opinion. Their acquieſcence and the plaintiff's is ſtrong evidence it never was ſo underſtood. The bill therefore muſt be diſmiſſed, but without coſts; for it was rather the fault of *Bradford* in not being explicit enough in telling what the 400*l.* conſiſted of, as would have been prudent: therefore his eſtate ſhould bear the coſts.

(503)

Price *verſus* Lloyd, *July* 13, 1750.

Caſe 205.

ON a bill for eſtabliſhment of a will in caſe of an infant it was objected, that it appeared, on examination to the interrogatories, that a witneſs to the will was a creditor for a bill of fees and diſburſements, and had not releaſed.

Poſt. July 26, 1751. Where a witneſs to a will was a creditor of teſtator.

It was inſiſted, that on account taken he would be found not to be a creditor.

Lord Chancellor ſent it to a Maſter to inquire, whether he was ſo; and ſaid, that *Anſley* v. *Dowſing* was brought into

Paſ. 19 G. 2. 2 Strange 1253.

into the *Exchequer Chamber*, where there was a difference of opinion among the judges; but the parties compounding, it was not determined, ſo that point was ſtill a little doubtful: and that it was going a great way to ſay, that if a legatee releaſed his legacy, it ſhould not make him a good witneſs.

Objected then, that the condition of the witneſs, as was determined by *B. R.* in that caſe, muſt be taken to be at the time of atteſtation; and that if intereſted then, he could not be a good witneſs.

Anſwered, that if the doctrine prevailed, it would overturn many wills; for in ſeveral, ſervants are made witneſſes, who generally have legacies given them.

25 G. 2. c. 6.

Caſe 206. Cole *verſus* Gibſon, *July* 18, 1750.

Marriage Brocage. Articles before marriage to ſecure annuity out of wife's eſtate to her ſervant, who had influence over her; and bond for 1000*l.* the bond delivered up; and a new grant of the annuity after marriage. The conſideration of the bond and annuity directed to be tried.

IN 1733 on a treaty of marriage between *Philip Bennet* and Miſs *Hallam*, then about twenty years old, articles were entered into, to which were made parties the intended huſband and wife, the defendant and Mr. *Ralph Allen*. The firſt clauſe therein was for ſecuring an annuity of 100*l.* to the defendant out of the wife's eſtate: but every other proviſion therein for benefit of the wife and iſſue of the marriage was made revocable by the wife, after the marriage ſhould be had. About the ſame time with the articles, a bond was given by Mr. *Bennet* before the marriage to pay the defendant 1000*l.* which bond was afterward delivered up to be cancelled; but at what particular time did not appear. A recovery was afterward ſuffered to the uſes of the articles. In 1736 a new grant was made to the defendant of this annuity; which was continued to be paid for ſome time after the wife's death: but the preſent bill was now brought to ſet it aſide. (c)

For plaintiff. Whether plaintiff is intitled to relief againſt this annuity depends on two queſtions: whether it is not in all the forms of it a marriage-brocage contract, as

(c) Prec. Chan. 165, 672, 522. 2 Vern. 588. 2 Eq. Abr. 187. 2 Chan. Rep. 176. 1 Vern. 412, 348. 2 Vern. 392. Salk. 158. 1 Wms. 120, 436. 2 Vol. 375, 264. 2 Atk. 535. 3 Atk. 566. Ante 277. In theſe caſes bonds in fraud of marriage agreement have been relieved againſt, but in 3 Wms. 66. ſuch a bond was held good, as it would be injurious to a former agreement made on a valuable conſideration, and prior in point of time.

as being the price on the ſale of the lady? And if ſo, whether any acquieſcence, payment or acts by plaintiff alone, or by plaintiff and his wife, will prevent the going into conſideration of the ground of the agreement, and the giving relief? It will appear that defendant was hired at wages, and was a nurſery maid in the lady's family; and got ſo abſolute a power and controul over her from her mother's death, and ſo entirely into her confidence, that ſhe could put a negative upon any match, and had the government and diſpoſal of her. The bond made part of the tranſaction, and was a bribe on the marriage: the only other conſideration ſet up is gratitude and generoſity in her miſtreſs. Then why did not defendant ſtay till after the marriage? Her anſwer admits giving the bond; but does not remember the conſideration. The principle on which the court goes, is, that the man giving theſe bonds cannot refuſe, if he will ſucceed in what he goes about. If the ſum to be paid on the marriage is to third perſons having no influence over the party, yet it is conſidered as bribing them; but ſtronger in caſe of a parent, guardian, or ſervant having gained a confidence; becauſe the marriage depends on it, and it was had in conſequence of this. One inſtance among others of her influence is, her directing the ſervant to bring her the letters of her miſtreſs's ſuitors, and telling her ſhe ſhould not have ſuch and ſuch perſons. Where the relief prayed ariſes from perſonal grounds of equity from impoſition, or the drawing into what was not underſtood or explained, ſubſequent acts of ratification ſhewing the plaintiff was fully informed, will rebut and take away the foundation. But where the relief is upon the agreements being corrupt, and ſuch as could not be entered into, though *particeps fraudis*, the court will relieve; for ſuch agreement ſhall not ſtand, and there is no inſtance, where acquieſcence can ſanctify an iniquitous tranſaction. As where uſurious intereſt is paid for thirty years, in *Boſanquet* v. *Daſhwood*; which being reheard, Your *Lordſhip* agreed with Lord *Talbot*; there every payment was a ratification: yet the court, thinking it a wrong act, ſo that no one could debar himſelf from taking advantage of it, decreed, that the account ſhould go back: gaming debts are relieved, however often ratified. If father and ſon clandeſtinely agree in fraud of the public marriage-agreement, and the ſon makes a new deed of it every day, he could not be barred relief, though a party; for no other could have it; the court relieving for the public in general. This agreement was a groſs injury to the lady, bribing the perſon, by whoſe advice ſhe

(504)

Tal. 38.

(505) was governed, into the match; which otherwiſe ſhe might not think proper, if her reaſon and judgment were exerciſed. If ſuch a ſecurity was taken on pretence of taking an account, it would be equally bad, being only a colour: but there is no evidence of any thing due to defendant, muſt leſs a ſum anſwerable to this annuity and the 1000*l.* which though given up, makes part of the tranſaction.

2 Ver. 652. 1 Sal. 158. 1 Wil. 118. In Duke *Hamilton*'s caſe, there was no perſonal impoſition, it being got before marriage, and in favour of the lady's mother, whoſe influence was preſumed: and whatever was preſumed there, will be proved here in reſpect of a common ſervant. The caſes on this head are in *Toth.* and 1 *C. R.* 87 *Octavo*, and *Show. P. C. Arundel* v.——— and *Show. P. C.* 76. *Hall* v. *Potter*, and 2 *Ver.* 445, and *P. C.* 165.

Evidence for the plaintiff to prove the contents of the bond, was objected to, as never done unleſs where the inſtrument itſelf cannot be had: whereas it appeared from the anſwer read, that the bond was delivered up to plaintiff, and muſt be in his cuſtody.

For plaintiff. This bill is not to be relieved againſt the bond; for then the objection would be good; but here it is only made uſe of as collateral evidence, as being part of the tranſaction, and to prove that it was on account of the marriage, and on no other conſideration.

LORD CHANCELLOR.

Evidence The beſt to be given, the nature of the thing admits.

The objection is founded on the proper and common rule of evidence; and in conſequence the plaintiff cannot be admitted to give parol evidence of the contents of this bond, as the caſe at preſent ſtands. The general rule is, the beſt evidence ſhould be given the nature of the thing will admit: and therefore as to all deeds, writings, and letters (d) they muſt be proved themſelves unleſs under certain circumſtances; as when ſhewn to be in the adverſe party's hands; for then you will be permitted to prove the contents: or if ſhewn to be deſtroyed, you may then read reaſonable proof of the deſtruction and parol evidence to the contents; which is then made the beſt the thing will admit. But, as the preſent caſe ſtands, the plaintiff has read, what is made evidence out of the anſwer, that the bond was executed, and that the defendant delivered it up to the plaintiff: which is evidence, that it is in plaintiff's cuſtody,

All deeds, &c. muſt be proved, unleſs in hands of adverſe party, or deſtroyed; then parol evidence of contents allowed.

(d) 2 Vol. 233.

cuſtody, and to prove the contents it muſt be produced. A diſtinction is endeavoured between a bill to ſet aſide the bond or inſtrument, of which parol evidence is attempted to be given, and a caſe wherein it is made uſe of only by collateral evidence: but there is no ſuch diſtinction in point of evidence; the rule being the ſame, whether it comes in by way of collateral evidence, or the very deed which the bill is brought to impeach. So it is in the caſe of letters, which are always uſed by way of collateral, circumſtantial, evidence to prove the facts; no bill being ever brought to ſet aſide letters. (506)

For defendant. Marriage-brocage contract is only, where money is given to procure a marriage; which on its original merits the court will never ſuffer: this is not ſo. If a lady of large fortune has contracted a friendſhip during infancy on the foundation of ſervices, and tells a man, ſhe will not marry, unleſs proviſion is made for ſuch a perſon; in purſuance of which the huſband and wife join to do that, which the wife ſaid ſhe would do; this is no contract for procuring the marriage. She often declared, that whenever ſhe did marry, ſhe would provide for the maintenance of defendant on account of her friendſhip for her. It is not a clandeſtine, private tranſaction without knowledge of the perſon to be procured. Huſband and wife both join; ſo that no injury can be to a perſon conuſant, a contracting party, privy to the whole. There is no evidence of a treaty with defendant that money ſhould be advanced, or that there ſhould be the marriage; nor that it was carried on with her privity or application to influence her miſtreſs. The queſtion here is different from that in other caſes, particularly *Hall* v. *Potter*, where the fact was admitted, but the conſequence denied: here the defendant allows the principle, if this is a marriage-brocage bond, but diſputes the fact; which is the ſingle queſtion, and depends on the evidence on both ſides. Here is ſufficient to ſhew, whence the grant took its riſe, and that it was fair and juſtifiable. It ſhould be proved, that this influence was acquired unduly; or ſo uſed, when acquired: whereas there is no evidence of any communication between plaintiff and defendant to do any ſuch office, as the equity of this bill is founded on. In all inſtances of marriage-brocage it is a proviſion by the party purchaſing or giving the bribe; and never ſo deemed, where done above board, and with privity of the perſon; who, if ſhe had been ſold, would not have been made party to the contract; being of an age to be ſenſible of

ſuch perfidy; which would rather have enraged her againſt the perſon procuring it. Beſide the plaintiff has releaſed to defendant.

LORD CHANCELLOR.

The court jealous of ſuch contracts with guardian or ſervant.

How far they may be confirmed.

It muſt be ſuch as is applied to that particular caſe: not barely by ſubſequent acts.

(e) To be ſure this court has been extremely jealous of any contract of this kind made with a guardian or ſervant, eſpecially with a ſervant, in reſpect of the marriage of perſons, over whom they have an influence; (and has been juſtly ſo; nothing tending more to introduce improper matches) and by rules eſtabliſhed, not regarding whether the match is proper or no, if brought about by a marriage-brocage contract, ſets it aſide; not for the ſake of the particular inſtance or the perſon, but of the public, and that marriages may be on a proper foundation: therefore though a proper match, as it was in *Hall* v. *Potter*, yet for the ſake of the miſchief that would be introduced, and to prevent that influence which ſervants more eſpecially would gain over young ladies, the court ſets it aſide: and if that was the nature of the contract, I do not know, that ſubſequent confirmations have been permitted to ſtand in the way of the relief ſought. I will not ſay, there may not be ſuch a confirmation or releaſe given, as may releaſe (507) the remedy of the party; for it is hard to ſay that in a court of equity, a man having a right of action or ſuit to be relieved in equity, and knowing the whole of the caſe, may not releaſe that, on whatever conſideration it ariſes, ſo far as regards himſelf: but it muſt be applied to that particular caſe, doing it with his eyes open, and knowing the circumſtances. Nothing is ſufficiently ſhewn in this caſe to releaſe and diſcharge that relief, the plaintiff might have on the grounds of the marriage-brocage contract: there is no recital or collateral evidence that it was applied, or intended to be applied, to any right of action or ſuit, the plaintiff might have to be relieved againſt this contract: and it now appears by the defendant's own ſhewing, on a plea put into a bill, calling her to account for the money received, that ſhe pleaded the releaſe only to that particular relief ſought by the bill, that prayed an account, not as to the relief againſt this contract and grant of this annuity; and is therefore to be reſtrained, as the defendant herſelf has reſtrained it; it being common in equity to reſtrain a general releaſe, (f) to what was under conſideration

General releaſe reſtrained to what was under conſideration.

(e) In Pre. Chan. 138. ſuch conſideration was held as none. 2 Vern. 446. Parl. Cas. 76. 2 Eq. Ab. 585. 3 Leon. 411.

(f) 2 Vol. 310.

conſideration at the time of giving it: ſo that this releaſe muſt be laid out of the caſe. Nor will the annuity's being granted after the marriage alter the caſe; for in that great authority in Lord *Coventry*'s time of *Arundel* v. ——— the bond for performance was given after marriage; the huſband having his hands free: yet the court even ſo long ago did not ſuffer it to prevail. In theſe caſes therefore ſuch a ſort of confirmation or ſubſequent acts have not been conſidered: nor in other caſes where there is remedy on like grounds; as in private, clandeſtine agreements in contradiction of the public marriage agreement; as by huſband to return part of his wife's fortune without the privity of his own relations; for unleſs ſomething releaſed or barred his action, the court will never ſuffer ſuch ſubſequent acts to bar it. But notwithſtanding all this be true, and the rule of the court is ſo, yet undoubtedly a huſband or wife, or both together, may with the privity of each other at the time of the marriage, agree to give a ſum of money or an annuity by way of reward to an old ſervant for ſervices performed; which when done with their eyes open by both, free from any imputation or contract in reſpect of the marriage to be had, but barely from the motive of gratitude or generoſity, the court will not interpoſe to ſet it aſide. The caſes of marriage-brocage bonds have been generally, where granted by one of the contracting parties without privity of the other; but if both agree to give on the marriage, no impoſition can be preſumed on one more than the other: though that is a pretty odd tranſaction to agree by the articles on the marriage to do ſo. But where the court does not interpoſe on the motive of gratitude for ſervices performed before and long attendance, the court is to look very narrowly into it to ſee, that that is the real conſideration; for as it is a pretence eaſy to be made, and has been often, the court is to ſee, that it is clear of marriage-brocage, and that one conſideration does not ſtand in place of the other. Laying all the evidence out of the caſe relating to the marriage-brocage, I do not like the tranſaction on the grant of the annuity itſelf: which is the very firſt clauſe in the articles, and the only part thereof not ſubject to power of revocation; which is a very ſtrange tranſaction; for though the power is in the wife herſelf, ſhe is in a very different ſituation after marriage, as her huſband may prevail over her by good or ill uſage: ſo that there is not a more uncertain or precarious way of ſettling an eſtate than by leaving the wife's ſeparate eſtate in her power after marriage; which was the conſequence of Mr. *Smith's* of

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Eſſex,

Eſſex, ſettling to the ſeparate uſe of his two daughters. Mr. *Allen*, the other party to the articles, has not executed them: nor is there evidence that he knew any thing of the matter. This annuity is provided by this deed for a ſervant, who, it is ſtrongly proved, had gained a very great influence over her miſtreſs. Why did ſhe not direct the letters to be brought to the guardian, who was then in the ſame houſe? She ought to have done it. If this had been done by a guardian on marriage of his ward under age, though he had not made himſelf party to the articles, but they were prepared with his privity, and one of the proviſions therein was for 100*l.* annuity to take place on that marriage, I would without any difficulty have ſet it aſide: and it appears, this ſervant had gained as much authority as a guardian. Abſtracted therefore from the marriage-brocage it is not to be countenanced, unleſs ſupported by better proof of the intent of both parties to make ſome proviſion for her. But how is this connected with any agreement, that can be called a marriage-brocage agreement? That depends on the evidence; which is not clear, but liable to uncertainty; yet it is under very great ſuſpicion; as it now ſtands before me. It appears, that it was the brother of defendant who introduced Mr. *Bennet* to this lady: it was opened, that the bond was on conſideration to pay 1000*l.* on the marriage; but that is not proved: and it muſt be taken, that the cancelled bond is in plaintiff's cuſtody. But how does it ſtand on the anſwer? The not remembering the conſideration induces a ſuſpicion; for it is impoſſible, that the defendant, who had nothing, could have forgot the conſideration of giving her 1000*l.* If the bond was given, as plaintiff ſays, to pay 1000*l.* on the marriage, and when the annuity was made ſecure by the recovery and declaration of the uſes, the bond was given up; it would be very ſtrong evidence, of this being a marriage-brocage bond; as being given for the marriage, and afterward the annuity is granted on the bond's being given up; which will tack them both together. But if the tranſaction ſhould appear to ſtand clear (509) of corrupt management, in reſpect of the marriage, and that the grant of the annuity proceeded from the generoſity of the miſtreſs, and with common conſent, and that the bond was given to ſecure the annuity, becauſe the miſtreſs was under age, that may be another conſideration. There is ſtrong proof of the general influence, which may be gained by proper ſervices, and made proper or improper uſe of. The defendant conceals the conſideration of the bond; and ſo does the plaintiff; it is proper therefore

fore to be inquired into to ſee, what was the conſideration of the bond; which muſt be tried. In *Stribblehill* v. *Brett*, it was twice tried; and the *Lords* did a very extraordinary thing; determining contrary, and without regard to the verdicts. They muſt have been of opinion, the iſſues were directed in ſome improper ſhape; for it cannot be ſuppoſed, they ſet it aſide as a marriage-brocage contract upon the proofs. This is not like fraud in general ariſing on a great variety of circumſtances, where it may be improper to try fraud or not fraud generally. P. C. 165,

I will therefore direct three iſſues. Firſt, whether the bond was executed in conſideration of, or as a *præmium* for defendant's procuring or aſſiſting plaintiff in his marriage, or on any other, and what conſideration. Second, whether the 1000*l* was thereby made payable at or on the marriage, or any other and what time. Third, whether the annuity or rent-charge was granted in conſideration of the bond, or procuring or aſſiſting plaintiff in his marriage, or for any other and what conſideration. But if the jury ſhall find any other conſideration for the bond or annuity, or any other time for payment, let it be indorſed.

Cornwal *verſus* Wilſon, *July* 23, 1750.

Caſe 207.

THE defendant a merchant in *London*, ſent orders to the plaintiffs merchants in *Riga*, as his factors to buy him ſome hemp at a limited price: the plaintiffs exceeded their bonds by the difference of 25*l*. 2*s*. 6*d*. the hemp coming to *England*, the defendant refuſes the contract; but however diſpoſes of it. The queſtion was in what manner the defendant ſhould be accountable to plaintiffs?

Merchant abroad as factor ſends over goods brought beyond the price limited, to one here, who refuſes the contract, but diſpoſes of them as his own and at a riſk: he ſhall not be conſidered as factor to his factor, but account according to the price paid.

LORD CHANCELLOR.

There are ſome things in this caſe very particular. It is the firſt caſe ever before me here ariſing between two merchants upon a contract of value, to the amount of 3000*l*. in the whole, including commiſſions, inſurances, and charges, to be heard on a queſtion and diſpute at firſt of about 25*l*. and I hope, it will be the laſt; they being a valuable ſet of men, of an advantage to the nation; running a riſk for their own profit indeed, but greatly for that

of

of their country; and it is hard they ſhould run a riſk for ſuch trifles. Though the price was limited, there was a latitude left with regard to the freight; which the plaintiffs contract for immediately, and ſhip immediately for *England*; and it is proved that the captain with whom they contracted, might have had a greater freight than what he had agreed for with the plaintiffs; which if the plaintiffs had been obliged to give, it would have made about 50*l.* difference. Defendant inſiſts, the plaintiffs exceed their orders as factors, in which they are not warranted; ſo that he is juſtified in refuſing the contract, and turning it on the plaintiffs themſelves, making them principals: to prove which, merchants have been examined, as they have been on both ſides: and the reſult is, that if a factor has not a general, but a limited authority to purchaſe at a certain particular price, if he exceeds that, his principal is not bound to accept of that contract, and take thoſe goods; and reaſon agrees therewith. But it is ſworn to be frequent among merchants, that where the factor exceeds a ſmall matter, the principal does not refuſe that, but takes it on himſelf, where there is a correſpondence between them. But however what merchants think fit to do in point of good nature, or to avoid a difference with a factor long employed, that perhaps cannot make a rule among merchants: but poſſibly there may be ſomething, that may make a rule, if on one part of the contract a factor makes an exceeding of his orders, and on another part relating to the ſame goods a ſaving, it will be juſt, not only for the merchant or principal to take the whole; but a court of equity ought alſo to conſider it ſo, and it would be very miſchievous if otherwiſe; which is the preſent caſe; the ſaving on the freight more than balancing the exceſs on the prime coſt of the purchaſe. But it is ſaid, that theſe things are not to be ſet againſt each other; for that it is equally the duty of plaintiffs to get the freight at as low a rate, even if they had purſued the orders as to the price; which indeed they ought: but that is not *ad idem*, nor an anſwer to the true ſtate of the tranſaction on the evidence; for the plaintiffs ſeeing the price of the freight was riſing more, than the price of the hemp was falling, had a right to take advantage of the low freight: ſo that if it ſtood ſingly on that between a merchant and a factor in a foreign country, the factor did right. But though I could incline to that, yet the preſent caſe turns on the latter part of the tranſaction, what defendant himſelf has done by taking theſe goods to himſelf, treating them as his own, not as factor for plaintiffs, as he would have

Cuſtom of merchants.

Factor exceeds orders on one part, ſaves on another, the principal, to take the whole.

have himſelf conſidered by the cuſtom of merchants: as to which it is ſworn, (and it is very true and reaſonable), that a merchant here refuſing the goods ſent over by his factor in a foreign country, who exceeded the authority, having advanced and paid his money on theſe goods, may be conſidered as having an intereſt in the goods as a pledge, and may act thereon as a factor for that perſon, who broke his orders, and may therefore inſure theſe goods, as he has done; which might be reaſonable, as it was war-time. But what does he do afterward? The time of arrival of the goods does not certainly appear; for though *Lloyd*'s liſt is of credit among merchants, I cannot take it as evidence of this. The defendant unſhipped them; it is ſworn, he acted with them as his own: he ſells them: not by an abſolute ſale, but the defendant ſhould be at the expence of tranſporting theſe goods from *London* to *Portſmouth*, and of the commiſſion for delivering them, and of the inſurance and voyage; which is not a ſale like a factor of goods for another; nor ſuch as a factor is warranted to make; for he ſhould have diſpoſed of them at *London*, the port to which the plaintiffs ſent; as he did a ſmall part; but it is not proved, that he endeavoured to ſell the reſt there, and could not. Defendant ſays, it lies on plaintiffs to prove, that he could diſpoſe of them; but it is not ſo. The plaintiffs could only ſhew, there was a market for them at *London* and a price; which has been ſhewn. Defendant having refuſed theſe goods, and therefore taken them as factor, for his factor, cannot run a riſk therewith: that is not the law of merchants; none of the witneſſes ſaying ſo; for in ſhipping at a new riſk, the factor, who is turned into principal, is not bound to ſtand to that; for that is going a great deal farther, than what the defendant complains of the plaintiffs. That he did run a riſk, appears from the defendant's own inſiſting on inſurance for the voyage, and the riſk of what might be the diſcount on the navy-bills; which might have been run down to, one knows not how much, if any misfortune had happened: and this was at the time of the rebellion, when the government was in ſome kind of diſtreſs. Notwithſtanding defendant's letter diſaffirming the contract, his ſubſequent acts explain the nature of the whole tranſaction and the intent, with which he acted; which ſpeaks more ſtrongly than witneſſes can do; and this letter plainly ſhews his inclination and deſire to have the goods at a lower price: and at the time of doing this it remained uncertain, whether the plaintiffs might not comply with this: in hopes of which he kept it in ſuſpence all the time:

time: which are not acts of a factor, but a principal. The court then is to say, he meant to take them as his own, notwithstanding what he said: and he ought to account with the plaintiffs according to the price they paid. Reserve costs generally till the account is taken.

Case 208. Williamson *versus* Codrington, *July* 24, 1750.

Voluntary provision in trust for natural children from death of father.

(512)

SIR *William Codrington* in 1715 made settlement of a plantation in *America* "to have and to hold to trustees to the use of *William* and *John*, two *Mulatto* boys, whom I had by a *negro* woman, their heirs and assigns for ever; they paying to another *Mulatto* boy, *Thomas*, son to another negro, 50*l.* annually from the day of my death, till *Thomas* arrives at twenty-one, then to pay him 500*l.*:" with a clause that he does oblige himself, his heirs, executors, and administrators, to warrant and for ever defend the said plantation, negroes, cattle, stock, *&c.*

In 1718 an ejectment is brought against him for the plantation; which he defends; but is evicted. He afterward brings an ejectment himself in his own name: but it is compounded upon 1000 guineas being paid to him for his title and conveyance of the estate.

After his death, this bill was brought by *William* in his own right, and as executor with another of his brother *John*, to have an account of the rents of the plantation, and a satisfaction for that rent received by Sir *William* in his life; and for the sum of money for which he sold and released his right, with interest from the time of receiving it; and for the produce of the negroes, horses, cattle, and other stock on the premisses received by him.

For plaintiff. First supposing he never intended to deprive the plaintiff of the benefit of that deed. Though no children are considered as purchasers under the statute *Eliz.* in opposition to creditors, yet it is impossible to say, this is not a reasonable act in him: nor any room to object, that plaintiff is a volunteer; for so are the defendants and all claiming under the will. If the thing had not been altered, but a necessity for the plaintiff's coming into this court for relief, as if the deed was out of his hands, or to have a satisfied term out of the way, where

where the queſtion is after death of the anceſtor it is no objection, that plaintiff is a volunteer. On a defective voluntary conveyance indeed, one can neither come againſt grantor or his repreſentative for an execution. This proviſion was to take place in truſt, immediately from the execution of the deed, and plaintiff is intitled to ſatisfaction for the value of this eſtate; and it was underſtood by Sir *William*, that the profits were to be laid up for their benefit; as appears by a will he made in 1717, providing for their maintenance another way; and his laſt will ſhews, he meant to keep up the beneficial part of this proviſion; for there he gives *Thomas* 500*l.* on condition that he releaſed the other 500*l.*

But ſuppoſing he endeavoured to diſappoint this grant: plaintiff is intitled to a ſatisfaction out of his aſſets for the value of the eſtate ſo ſettled, which came to his hands; he having covenanted under hand and ſeal to make it good; which wants no other conſideration. An action might be maintained at law on it. It was determined ſolemnly by the *Lords* in *Vernon* v. *Vernon*, that a right to come for ſatisfaction out of aſſets, ſhould intitle to ſpecific relief; which ſeemed to go farther than former caſes in relief for volunteers. The ſame queſtion came before his *Lordſhip* in a caſe much debated, of *Fagg* v. *Naſh*, wherein the material decree was made 22d *October* 1744: where the plaintiff, one of the ſeveral daughters of Sir *Robert Fagg*, claimed under marriage articles of *Robert* the ſon; by which the father and ſon covenanted to ſettle to the uſe of father for life, to ſon in tail, then to one of the daughters, if the father did not limit it to other uſes. On a bill for ſpecific performance, the defendants, coheirs at law, inſiſted that ſhe was a volunteer; no conſideration moving from the brother; and that as to the father it was liable to a power of revocation: his *Lordſhip* obſerved, on the authority of *Vernon* v. *Vernon*, that the ſon had bound himſelf by covenant, though being tenant in tail he might have barred, but had not done it: that the covenant bound the real aſſets of the ſon as well as the perſonal, and the real aſſets of the father: that if an action had been brought on the covenant, they would be intitled; and that to prevent circuity was the ground of giving that ſpecific relief. (513)

For defendants. The defendants, executors and truſtees under the laſt will, were ſtrangers to the whole tranſaction, on which the demand is made. It was originally deſigned

deſigned as a proviſion to take effect from the death of Sir *William*. The deed contains indeed a general warranty: but there is no caſe, where the court has conſidered a covenant by way of general warranty a perſonal covenant. This is the firſt inſtance of a gift of a general warranty on a voluntary deed: ſo that ſuppoſing it looked on as a covevant, yet being ſo extraordinary, how far ſhould a court of equity give it aid? Had there been an actual recovery of a ſum by judgment, ſo that it was liquidated and really due, the court might aid: but not otherwiſe. Suppoſe this a deed under any legal imperfection, as a feoffment without livery, or bargain and ſale in *England* without inrollment, the court would not aid; for though one is naturally obliged to take care of his natural children, yet in *England*, in the moſt favourable inſtance, a baſtard is not conſidered as a child; for by will under the ſtatute of *H.* 8. a mother could not give her own *knight ſervice* land to a baſtard child: nor can a covenant to ſtand ſeiſed to their uſe. So that no aſſiſtance ſhould be, unleſs this is ſuch a covenant for which full ſatisfaction ought to be given. But this is a general warranty of the land; and that extends only to the title; on which only a real remedy could be
(514) had: as if they were in poſſeſſion, and a real action was brought againſt them, to intitle the tenant to the *præcipe* to vouch warrantor or his heirs, or to bring a *warrantia chartæ* to affect the lands of warrantor or his heirs: unleſs it was a chattle eſtate recovered, for which there may be perſonal damages. This is only to warrant, as things then ſtood; as the warranty of a houſe will not oblige to rebuild, if burnt down. The court will not ſay, they will give the value of the land, becauſe it might come before a jury, who would give thoſe damages. Moſt likely a jury would not give to the full value; for a jury is not bound to give damages *ad valorem*: and if this was not under hand and ſeal, nothing could be recovered on it at all, as it would be *nudum pactum*. They ſhould therefore go to law to judge whether it is an effectual perſonal covenant or not.

LORD CHANCELLOR.

I do not wonder, that Lady *Codrington* thinks fit to make a ſtand againſt this demand, eſpecially in its great extent, or that the other truſtees and executors joined therein; it being incumbent on them to defend the eſtate in the beſt manner. Beſides ſhe muſt have ſome reſentment againſt this kind of conduct in her huſband. But when

when it comes before a court of juſtice, the court muſt conſider the rights of the parties reſulting from the acts done, conſiſtent with the nature and foundation of that demand, and the juriſdiction in which the relief is ſought.

Bill lies for ſatisfaction out of aſſets of a voluntary debt by ſpecialty; but if doubtful, whether action lay thereon, or damages uncertain, it will be tried at law. Defect in voluntary deed not ſupplied, nor ſpecific performance.

The firſt queſtion is with regard to the nature of the remedy the plaintiff has taken; for as to the other circumſtances, certainly, though the conduct of this gentleman appears very extraordinary, yet when he had theſe children, in whatever way, or of whatever colour, it was a natural duty incumbent on him to provide for them: and whatever proviſion was made for them, ſo far as they ſhould be intitled in law or equity, the remedy muſt be extended for their benefit. The remedy taken is by bill for ſatisfaction out of aſſets; not inſiſting to follow the ſubject itſelf. Undoubtedly a bill may be for ſatisfaction of a debt out of aſſets real and perſonal, which debt may be created voluntarily by the teſtator; for though one cannot come into equity to ſupply a defect in a voluntary deed without conſideration, or in many inſtances cannot come for ſpecific performance of ſuch an agreement, yet if he has a ſpecialty, he does not want proof of conſideration; but may come into equity as well as law to have ſatisfaction for that debt on that ſpecialty out of aſſets; and then the court will not ſend it to law; but will judge, whether he has a ſpecialty or not. Indeed if it appears doubtful to the court, whether it is a ſpecialty, on which an action at law could be maintained, or the damages ſo uncertain that it could not be ſettled without being tried by a jury, the court will, as in other caſes have the aid of a court of law: but unleſs ſuch a neceſſity, will not ſend it to law to make two ſuits out of one. The plaintiff is proper to have a decree, ſo far as his right extends; to determine which extent, the nature of the ſettlement, and covenant therein contained, muſt be conſidered. I am of opinion on the whole circumſtances of the caſe (and perhaps the court ought to take the greater latitude as it is a voluntary deed) that the true meaning was not, that this conveyance ſhould take effect in poſſeſſion in truſt for theſe two children, but after his deceaſe: and there are words in it, which though improperly drawn in, and perhaps in ſtrict conſtruction refer to another matter, to the payment to *Thomas*, yet are they ſuch, as an ignorant perſon, no lawyer, might naturally think, the whole was to take place after his death: and it is extraordinary to think, he ſhould make an inſtrument putting the eſtate out of his power, and make the proviſion for maintenance, and

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the proviſion for another boy to commence only from the day of his death. A very ſmall tranſpoſition of the words without any change of one of them, would make it a plain declaration of the whole truſt to take place after his death: and as they are, they might very naturally have been underſtood ſo. As this is the conſtruction, in the mean time it would be a reſulting truſt to himſelf. It is material to conſider, how all the parties underſtood it from the time of execution of this deed. The truſtees did not apprehend they had any thing to do with this plantation: Sir *William* kept poſſeſſion, though let to a tenant, and the rent to run in arrear, and in mean time maintained theſe two children in a handſome and generous manner, conſidering what they were, and in ſome degree advanced them in the world. He alone made defence in the ejectment; the truſtees, though conuſant of the deed, not interfering. On eviction he brought an ejectment himſelf in his own name; how far that might have prevailed, if this deed had appeared, I will not ſay; but it ſhews his apprehenſion. The money on the compoſition was paid to him. He calls on the tenant for the rents: an account is made up; and therein included not only the arrears incurred from the time of execution of this deed, but four years before. In making up that account, one of the truſtees acts as attorney for him; and the money due was paid to him with privity of the truſtee conuſant of the deed. Beſide he deſired the plaintiff's mother to take particular care of this deed; for that it was for the *future* benefit and advantage of her children: and it is very improbable, that he ſhould make a ſettlement of this plantation abſolutely out of his own power in his life on theſe children then about five or ſix years old. Nor does the will in 1717 afford an argument, that he underſtood it in another ſenſe. It appears, the plaintiff's mother among ſeveral other women of this ſort was his favourite. He brought her to *England*; not ſending her back till after he was married; and might think ſo fondly then of her and her children, as to intend to make an additional proviſion for her and her children, as to intend to make an additional proviſion for her by his will, without regard to what he had
(516) done in his life. That was quite of a different conſideration, and not contradictory to the ſenſe I have put on this deed.

If voluntary conveyance is defeated by ſale, it is

But then ariſes another point on the covenant; for let him intend what he will, if it is a voluntary ſettlement, and he has ſince conveyed away the eſtate for valuable conſideration

ſideration, theſe children or their truſtees cannot recover it back from ſuch a purchaſer; for by *Statute Eliz.* (which, I ſuppoſe, is taken to be law there) the purchaſer muſt retain it againſt them: and if that was the whole of the caſe, there is no covenant of ſpecialty to oblige Sir *William* or his eſtate to make it good. There is no inſtance, where a voluntary conveyance is afterwards defeated by ſale for valuable conſideration, that a ſatisfaction can be demanded againſt him or his eſtate, unleſs for ſome covenant on which an action or ſuit might be maintained. Therefore plaintiff reſorts to the clauſe, which he inſiſts on as a covenant from Sir *William*, intitling him to ſatisfaction for what was loſt by eviction of the eſtate out of his aſſets real and perſonal: and if it amounts to a covenant, it will intitle thereto. I am of opinion, it is not to be taken according to the objection for defendant as a ſtrict warranty of the land; which would be contradictory to the words of the clauſe. The word *Warrant*, when properly applied, has to be ſure a particular ſenſe; but has in general a further ſenſe: therefore it is not neceſſary to underſtand *Warranty* in a deed or covenant barely as a warranty to the title to the realty: but it ſhall be taken *ſecundum ſubjectam materiam*. Here are chattels to be warranted in this deed; ſome of which are certainly perſonal things, as cattle, horſes, &c. though negroes in ſome inſtances are conſidered as annexed to the plantation. Then there are words binding his executors and adminiſtrators; which muſt be rejected, if to be conſtrued as a mere real warranty of the land. This clauſe therefore is inconſiſtent with that narrow conſtruction: nor is it penned as a real warranty; which is, "I do for myſelf and my heirs warrant ſuch land;" here the words are, "I do oblige," &c. which amounts to the ſame as, "I covenant," &c. for many other words in a deed will amount to a covenant beſides the word *covenant*; as "I oblige, agree." This then is barely a covenant for himſelf, heirs, executors and adminiſtrators, to warrant; which word muſt be conſtrued in a larger ſenſe than warranty in a ſtrict legal ſenſe; as large as *defend*. That conſtruction muſt be the ſame in both courts: and there is no difficulty, I think, in ſo conſtruing it in a court of law. I allow, a jury is not bound to give damages *ad valorem*; but may mitigate according to the circumſtances. But to what purpoſe ſend it to law? There is no doubt of the conſtruction of the covenant; nor is it for the benefit of either party to create two ſuits out of one. Beſide I ſhould ſend this to law at a greater hazard to defendant than to plaintiff, becauſe, though I think,

void as to purchaſer; and no ſatisfaction, unleſs a covenant on which ſuit might be maintained.

Warranty in a deed conſtrued as the ſubject matter.

Words amounting to covenant in a deed.

Jury need not give damages *ad valorem*.

(517) think, this is the conſtruction on the deed, and I am warranted therein from the ſame, and more ſtrongly from the ſenſe of all the parties, yet if it comes into a court of law, by action of covenant, if it could be maintained, that could not take in any of theſe conſiderations: ſo that the plaintiff, if he recovered, muſt recover according to ſtrictneſs the profits by way of damages from that time. Then the next queſtion is, what relief ought to be in this court? And I am of opinion, the plaintiff is intitled to relief; which is indeed agreeable to the intent: for it is plain, that by his ſale he did not mean to defeat the proviſion he thought he had made for theſe children; but meant to keep up the beneficial part of it from them; as appears from the obſervation on his laſt will; wherein he makes a proviſion for *Thomas* in lieu of the other, but none for plaintiff and his brother, though his greateſt favourites. Then what kind of relief? It is demanded very largely; to which I cannot think plaintiff intitled: even in the caſe of a legitimate child where a father had made a voluntary ſettlement, and maintained that child, not paying over the profits thereof to that child, it would be very difficult to ſay, that child ſhould have an account back of theſe profits; which could not be done without deducting that maintenance. I muſt proceed by the ſtrict rule, *viz.* that plaintiff ſhould have ſatisfaction for the value of the plantation, as it ſtood at the time of the ſale, and the negroes, *&c.* from the death of Sir *William*, according to the value at the time of the eviction, which the maſter muſt inquire into, with *Engliſh* intereſt on that ſum, as it is conſidered as *ſterling money*, from his death.

If on voluntary ſettlement by father an account is directed for the child, maintenance to be deducted.

Caſe 209. Grigby *verſus* Cox, *July* 24, 1750.

Purchaſe from wife of part of her ſeparate eſtate without her truſtees: with covenant by huſband to be free of incumbrances; no proof of huſband's influence:

ON the marriage of defendant and his wife, an eſtate was ſettled in truſtees to receive the rents and profits for her ſole and ſeparate uſe, and as ſhe ſhould direct and appoint, whether ſole or covert. The wife by deeds of appointment ſells part to the plaintiff; and the huſband covenants, that the ſaid purchaſe ſhould be free from incumbrances: but the truſtees were not conſulted therein.

The bill was to have the effect of this bargain; and praying, that plaintiff may be decreed to receive the rents and profits of this part of the eſtate free from the deduction of the mother's dower.

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The wife inſiſted, that plaintiff had colluded with her huſband to take away that ſeparate power from her: that plaintiff paid the money to her huſband, though he ſaw this ſettlement to her ſeparate uſe; therefore did not come into equity unexceptionably and on fair grounds; and that her friends and truſtees ought to have been conſulted.

Decreed a purchaſe: but plaintiff to rely on his covenant againſt the huſband.

LORD CHANCELLOR.

Whatever ſuſpicion or inclination the court has againſt ſuch a tranſaction, yet as defendant has brought this caſe without any proof; it is not impoſſible to decree to plaintiff the purchaſe of this equity and truſt, the benefit of this purchaſe as againſt the wife ſo far as purchaſed from her, and as againſt the huſband ſo far as he has bound himſelf by his own contract. (g) For the rule of the court is, that where any thing is ſettled to the wife's ſeparate uſe, ſhe is conſidered as a feme ſole; may appoint in what manner ſhe pleaſes; and unleſs the joining of her truſtees with her is made neceſſary, there is no occaſion for that. And this will hold, though the act done by the wife is in ſome degree a tranſaction alone with the huſband: although in that caſe a court of equity will have more jealouſy over it: and therefore if there is any proof that the huſband had any improper influence over the wife in it by ill, or even extraordinary good uſage, to induce her to it, the court might ſet it aſide: but not without that. The wife might have made an immediate appointment for benefit of her huſband; which would have ſtood, unleſs ſome ſuch proof as before mentioned. Then it certainly cannot be an objection againſt a purchaſer: and if the caſe is free from other objections, as from the defect of proof it is, the taking the huſband's covenant can be no objection. A prudent man acting very fairly and honeſtly, and conſulting the truſtees, might have reaſonably inſiſted on a covenant from the huſband, that the eſtate was free from incumbrances; for ſuppoſe, the wife had made a prior ſecret appointment, how could a purchaſer be ſecured without a covenant of the huſband? for the covenant of the wife could not have bound her, as the prior appointment would take place. A court of equity cannot ſay, this is wrong, unleſs ſome proof appears of ill uſage or diſtreſs by the huſband. I ſhould have great difficulty in carrying this agree-

Wife a feme ſole as to her ſeparate eſtate.

Her truſtees need not join, unleſs made neceſſary.

(g) Ante, 303. 2 Vol. 190, 75. 2 Wms. 144.

ment into execution, or eſtabliſhing this purchaſe: but as it is without proof, it is impoſſible to ſay, this is not a purchaſe.

Then as to the exoneration of this part of the lands from the mother's dower by turning it on the other part of the eſtate, which ſtill is ſettled to the ſeparate uſe of the wife, that depends on the appointment of the wife, whether ſhe was bound by that appointment to do ſo; for as to the covenant by the huſband that it is free from dower, that will not affect the wife; nor has plaintiff a title to that decree againſt her, but has a remedy againſt the huſband. The power of the wife was under this ſettlement which is made ſubject to the dower; ſhe being to receive the rents and profits to her ſeparate uſe over and above the dower, which run over the whole. Then if the wife made an appointment, it was only over and above the dower: the plaintiff then muſt rely on that covenant to indemnify, and make him ſatisfaction. In a caſe of this kind I will not go a jot further, than I am obliged by the ſtricteſt rules that can be. It would have been more prudent if the purchaſer had talked with the truſtees about it. This ſort of tranſaction is generally contrary to the intent; for where a feme covert is to receive rents and profits to her ſeparate uſe, the friends of the wife mean not, that ſhe ſhall make a ſale of it, but receive it from time to time.

(519)

Coſts againſt huſband only.

No coſts as againſt the wife; it being a purchaſe of this kind, I cannot carry it further: but as againſt the huſband I think the plaintiff is intitled to coſts.

9 February, 1739.

N. Thayer v. *Gould*, as cited at the bar, was, money to be laid out in land to be ſettled to the huſband for life, then to wife for life; the huſband wanting the money, it was paid to him; after his death a bill was againſt the truſtees to oblige them to refund to her, becauſe ſhe was not examined: and an abſolute decree was iſſued againſt the truſtees at the *Rolls*; but when it came before his *Lordſhip*, it was compounded.

Barret

Barret *verſus* Beckford, *July* 24, 1750. Caſe 210.

Satisfaction. Legacy of a moiety of reſidue not a ſatisfaction for an annuity, teſtator was to pay under the will of his teſtator.

(h) *J. Barret* being by the will of *James Pope*, to whom he was executor, to pay 300*l. per ann.* to his aunt *Margaret Pope*, deviſes the reſidue of his eſtate to his mother and his aunt *Margaret* for life.

On a bill by the mother the queſtion was, whether this moiety of the reſidue for life was not a ſatisfaction of that annuity.

For plaintiff. This is a ſatisfaction; being more than the 300*l.* annuity. A perſon, by virtue of his eſtate being debtor for an annuity, charges by name of reſidue all his eſtate therewith. Suppoſe he gives her 300*l per ann.* out of the eſtate of *Pope*; that would be ſpecifically doing it; and it is done in effect, though not in words. But conſidering it as a debt due from executor receiving aſſets, which he is bound to pay, ſuppoſing he had given ſecurity, or a bond for the payment perſonally of 300*l. per ann.* and gave his reſiduary eſtate during life: that would have the ſame effect, as if he gave an annuity to the value out of the reſidue: but it is out of another fund; and can it be ſaid to be leſs a debt from him, whether he himſelf gives a bond for it, or by receiving aſſets makes himſelf debtor for it? A ſum of money to a wife has been held a ſatisfaction for arrears of pin-money; though only recoverable in this court. *Lee* v. *D'Aranda*, *Feb.* 1746-7, and *Door* v. *Geary*, *June* 12, 1749, are applicable: nor could he intend ſo great a diſproportion between his aunt and mother, as will be, unleſs this is admitted a ſatisfaction. The intent is to make them entirely equal: and they ſeem joint-tenants, and a ſurvivorſhip for their lives. (520)

For defendant. No intent is ſhewn, that what is given ſhould go in ſatisfaction of any thing defendant is intitled to under her huſband's will; therefore it has been argued from the nature of the caſe, wherever ſatisfaction is decreed, it muſt run on all fours: and in many caſes the

(h) 2 Vol. 37. 1 Brown, 481. Ante, 263, 126. 2 Vern. 258. Pre. Ch. 228, 314. 2 Wms. 553. Legacy to a child not a ſatisfaction of a bond to the ſame child, the bond being payable before the legacy. 1 Brown, 295. The value of a beneficial leaſe granted to a natural ſon, not a ſatisfaction *pro tanto* of a legacy to the ſon in the father's will, they not being ejuſdem generis, 1 Brown, 425.

court has doubted, whether, if it came originally before them, they would have gone ſo far. It is begging the queſtion to ſay, he intended them equal ſhares; for it is ſo only in the reſidue after diſcharging the burthen. Though the reſidue may in the event be more than ſufficient to pay the annuity, it was an uncertain and precarious benefit. In the caſes cited, what the executors did, was part of the performance of the contract; and the performance was out of that fund, out of which he was bound to make ſatisfaction, but where the former will make a fund liable, and the latter takes no notice thereof, but gives a moiety of the whole eſtate, there is no inſtance of that being a ſatisfaction. In conſtruing a legacy a ſatisfaction, the court conſiders it as a debt moving from himſelf; as a ſatisfaction for the teſtator's covenant: but never where he is obliged to pay by reaſon of aſſets in his hands, where the debt is not due from himſelf.

LORD CHANCELLOR.

I am of opinion, this legacy of a moiety of the reſidue of his perſonal eſtate is not a ſatisfaction for the annuity. No caſe is cited of a deciſion in this court of a ſatisfaction carried to that extent, which indeed in this court has gone a great way, and in ſome inſtances has been a little regretted. But that has been on another head; where a legacy has been preſumed a ſatisfaction for a debt by the ſame teſtator; the objection to which has been, that where one ſays he gives a legacy, which is ſuppoſed voluntary, it is pretty hard to ſay, he meant to pay a debt inſtead of that. But this is clear of that objection; for on the head of preſumed ſatisfaction for a portion to children the court has gone a great way, where one is diſpoſing of an eſtate among his children and family, and is obliged to give a portion by marriage-ſettlement, and has given a like or greater ſum by will; (i) the court leans againſt double portions or proviſions, tending to bring a greater burthen on the heir of the family; but this is not of that kind. The caſes cited are not like this in the reaſon of the thing. In *Lee*

(i) Ante, 316. Where portions are charged on an eſtate which goes to the eldeſt ſon, additional portion, on conditions, ſhall be like laws made after others, and ſhall repeal the former. Pert Lord Thurlow, 1 Brown, 296. In 3 Atk. 96, it was held that in the caſe of portions, as both move from the ſame perſon, the court will overlook any little incumbrances, as difference of the time of payment, and conſider one as a ſatisfaction for the other; which rule was recognized by Aſhurſt, juſtice in 1 Brown, 310, and according to which he decreed, that a proviſion by will was in part, ſatisfaction of a portion by ſettlement.

Lee v. *D'Aranda*, if the adminiſtrator paid the reſiduary part, which amounted to more, it was actually a payment and performance: ſo the court held in *Blandy* v. *Widmore*, where the covenant was to leave; and in whatever way left it was a performance; ſo is *Door* v. *Geary*. There is ſome kind of uncertainty in caſes of preſumed ſatisfaction in this court; and it may be difficult to reconcile every one of them. But *Duffield* v. *Smith*, 2 *Ver.* 258, is applicable: there was a difference of opinion, and the *Lords* were againſt the ſatisfaction; which determination goes a great way in this. (k)It is a general rule of ſatisfactions, that the thing to be conſidered as a ſatisfaction ſhould be exactly of the ſame nature, and equally certain: here it is not of the ſame nature. The firſt is a clear annuity of 300*l.* the will a moiety of the reſidue of the perſonal eſtate, whether more or leſs: which though probably it would be more than ſufficient, yet it was uncertain from accidents, if he lived longer after the will. It is ſaid, that in this way the proviſion for the aunt is greater than that for the mother, which is unnatural: that will not be as moving from him; but I believe, he intended it. He owed every thing to this uncle; and he certainly then intended to be bountiful, to make an addition, and ſhew a reſpect to his aunt. Then no authority is to reſtrain it, or that the proviſion by the huſband ſhould be deducted out of that bounty meant by the nephews.

The court leans againſt double portions, and preſumes a like or greater legacy a ſatisfaction. 2 Ver. 709.

The ſatisfaction ſhould be exactly of ſame nature and certainty.

(l) Next a doubt was made on the will of *James Pope*, whether a limitation over was too remote and alſo uncertain; he having deviſed his full and whole eſtate, bank-ſtock, *&c.* to his nephew *J. Barret*, and his legitimate heirs; if he died without legitimate heirs, then to the family of the *Popes* his relations.

Limitation over after legitimate heirs too remote, unleſs confined to time of the death.

LORD CHANCELLOR.

The proper conſtruction of *legitimate heirs* is heirs of his body lawfully begotten; for if to him and his heirs lawfully begotten, that would be heirs of his body: and then the contingent limitation over would be too remote and void according to the caſe of Lord *Beauclerk*, unleſs there is ſomething to confine it to the time of his death.

Piers

(k) 2 Vol. 636. 2 Vern. 478. 2 Brown, 100. (l) 2 Vol. 121.

Caſe 211. Piers *verſus* Piers, *July* 23, 1750.

Waſte.

(m) THE plaintiff brought an original bill againſt his father, tenant for life without impeachment of waſte; to have 1000*l.* raiſed and ſettled according to agreement; and alſo a ſupplemental bill for waſte committed at a houſe in *Wells* by the father's pulling up a *deal-floor*, and removing it to his houſe at *Bradley* (which was ſaid to be like pulling down a manſion-houſe, like the caſe of *Raby Caſtle*) his removing ſome young oaks, turning meadow into plough-land; and the contrary.

2 Ver. 738.

Bill by ſon againſt father tenant for life without impeachment of waſte, for removing oaks planted, and a floor placed by himſelf, and no injunction applied for; will be diſmiſſed.

It is very unfortunate, ſuch an expence ſhould be created between a father and ſon. The clauſe, *without impeachment of waſte*, is generally put in to prevent diſputes of this kind: but if it was to be ſo made uſe of, that a ſon ſhould have it in his power to call a father into a court of equity for every alteration he makes in a walk or an avenue, though he removes the trees to another part, and ſo of the houſe, it would be ſuch a fund for diſputes between a father and ſon, there would be no end of it; and it would be better for the public, that *Raby Caſtle* had been pulled down, than that precedent had been made. It is not an immaterial circumſtance for the defendant, that an injunction was never applied for, which is always done on ſuch a bill as this; which muſt be maintained on the head of deſtruction and ſpoliation. Beſide this floor was placed, and the trees planted, by the father himſelf: therefore, if no more in the caſe, I would diſmiſs the ſupplemental bill with coſts to be taxed. But on the original bill the plaintiff has an equity to have the 1000*l.* raiſed and ſettled. (n) If a father tenant for life, wants to raiſe a ſum, and gets his ſon to join for the ſecurity, but the father receives the money, it is the debt of the father, who will be bound to exonerate the ſon's eſtate from this incumbrance; for the ſon will be conſidered as having pledged his eſtate for that purpoſe: juſt

Father tenant for life and ſon join in raiſing money, received by father: he muſt exonerate ſon's eſtate.

(m) 1 Brown, 159.

(n) Son having a remainder in fee, joins his father, tenant for life, in a mortgage to raiſe money for the uſe of the father, the mortgage not being paid off till after the father's bankruptcy, the ſon cannot prove his intereſt under the commiſſion. 1 Brown, 384.

juſt as if wife joins with huſband in raiſing money on her eſtate, it will be conſidered as pledging her eſtate for that, and the huſband is bound to exonerate it.

So of huſband and wife.

Conyngham *verſus* Conyngham, *July* 31, 1750. Caſe 212.

——— *Conyngham* deviſed the rents and profits of his plantation, now in leaſe to his ſon, to three perſons and their heirs, on certain truſts, one in *Scotland*, one in *St. Chriſtophers*, one in *London*.

The eſtate being by decree directed to be ſold; the defendant *Coleman*, the *London* truſtee, petitioned to rehear the cauſe for that reaſon, and next, becauſe he was thereby made accountable for the rents and profits of the plantation, which came to him: whereas, though named a truſtee in the will, he never accepted it, nor acted as ſuch, but only as agent or factor for *Daniel Conyngham*, the teſtator's ſon and heir at law; to whom he had accounted, and therefore he was not bound to account to plaintiffs or any claiming under this truſt. No one is bound to accept a truſt againſt his will: this is a deviſe of the receipt of particular rents and profits; they were remitted, not to defendant, but to *Daniel*, who was in *England*, and put the bills of lading into the hands of defendant as his factor to diſpoſe of them, not under the will.

Truſtee acting with notice of the will, receiving the profits, and not renouncing, cannot ſay he acted as factor, and muſt account to claimant under the will.

LORD CHANCELLOR. (523)

A court of juſtice muſt wink extremely hard not to ſee the ground of ſo much oppoſition to the plaintiff's clear right, and the hope to take advantage of delay from the perſons litigating being in different countries, and ſubject to different juriſdictions: and it is incumbent to lay hold, if poſſible, on any foundation to prevent it.

As to the firſt complaint, I think myſelf not warranted from this will to decree a ſale. This happens to be ſometimes attended with inconvenience; as in *Ivy* v. *Gilbert*: but I cannot go farther, unleſs there is ſome other right of incumbrances, *&c.* The direction therefore for ſale muſt be left out, and inſtead thereof inſerted, that all creditors of teſtator, annuitants, and legatees under the will, may come before the Maſter to prove their claims; for they muſt

2 Will. 15.

Deviſe of rents and profits; a ſale not decreed.

muſt be paid *pari paſſu*, as it is to be by annual perception of rents and profits.

As to the next, if the caſe is, as defendant inſiſts on, he is not liable to account in this manner; but on all the circumſtances, I think, the court ought to take him to have acted with notice of this truſt, on the foot of it, and to account for it; otherwiſe it would be a very dangerous precedent: for if the court ſhould lightly give way to what defendant inſiſts on, the conſequence would be to open a door by colluſion between the heir at law, or owner of the eſtate ſubject to the charges and truſts on it, and the truſtee; for the truſtee might materially act and diſpoſe of all the profits of the eſtate, and yet not be accountable, but the *ceſtui que truſt* would be turned againſt the heir or tenant for life though in another country. The truſtee might ſay, he did not act as truſtee, but merely as agent. To prevent this the court ought to look very narrowly into the acts of perſons in that light, and ſee whether there is any ground to affect him with this truſt. The defendant has been in a great connexion with *Daniel* (I avoid calling it colluſion) and willing to do what was moſt favourable for him. There is a plain admiſſion of notice of the will; which if it amounts not to a deviſe to thoſe three perſons, I know not how to conſtrue it. It is admitted, a deviſe of the rents and profits of land is a deviſe of land; but this is ſaid to be a deviſe of a particular rent. Suppoſe a will deſcribes it as a particular rent, or profits of a particular eſtate, and ſuppoſe it is miſtaken therein; as if here was no ſuch leaſe to the ſon: is there an authority, that this direction will not amount to a deviſe of the rents and profits, ſuch as they are? But whether here is an expreſs deviſe of the land, or only a power and authority, ſtill it is a truſt for defendant for this purpoſe; who having notice of this will and plaintiff's claim, and the whole coming to
(524) his hands by the delivery over of the very perſon who was to have remitted the produce to him nominally, it was incumbent on him, if he would not have acted as truſtee, to have refuſed, and not, going on in his ambiguous way, to leave himſelf at liberty to ſay he acts as truſtee or not. Inſtead of this he goes on receiving the produce: on this foundation he is directed to account; and I will hold him to it, and not leave him out of this decree, when he has acted thus merely to put the plaintiff to difficulty in coming at his right. Having notice of the will and plaintiff's demand, and ſubſtantially done the directions of the will as far as could be, in receiving from the hands of *Daniel*, without

without telling that he renounced the truſt, it would be very dangerous to diſcharge him, and leave the plaintiff to purſue a remedy I know not where.

Garth *verſus* Sir John Hind Cotton, *July* 1750. Caſe 213.

Waſte. Poſt. 546. Auguſt 10. Tenant for 99 years if he ſo long live without impeachment of waſte except voluntary, remainder to truſtees to preſerve, &c. to firſt, &c. ſons in tail, remainder to *A.* in fee, having no ſon agrees with *A.* to fell timber and divide the profits: has afterward a ſon, who recovers from *A*'s repreſentatives.

(o) MR. *Garth* tenant for ninety-nine years, if he ſo long live, without impeachment of waſte, excepting voluntary waſte, remainder to truſtees during his life to preſerve contingent remainders, remainder to his firſt and every other ſon in tail, remainder to defendant Sir *John Hind Cotton* in fee: *Garth* having been long married without having children, enters into an agreement with defendant to cut down timber on the eſtate, and divide the profits between them. He has afterward a ſon by another wife, who after his father's death, when of age, and having ſuffered a recovery, brings this bill to oblige defendant to refund 1000*l.* received by him as his ſhare of the money ariſing by ſale of timber, with intereſt.

For plaintiff. There is no particular precedent exactly, as the caſe ſtands; therefore it muſt depend on general principles. The queſtion is whether they had a right to cut timber? And if not, whether the plaintiff thereby is injured; which is neceſſary for plaintiff to ſhew, and that defendant at time of doing it was wilfully guilty of an injury to plaintiff, that is, the unborn children of *Garth*; for if this is a damage without an injury, the court will not give ſatisfaction.

The truſtees were to preſerve the contingent uſes of every thing, that was ſettled. To avoid a perpetuity was this method of preſerving eſtates in families a certain time by inſerting truſtees; which (ſaid to be invented by Lord *Bridgman*) has been ſince extended by a court of equity. If truſtees joined, the court would make them liable for a breach. It was by ſome conveyancers doubted whether the truſtees joining could bar; which came firſt in *Pye* v. *George*, where Lord *Harcourt* ſaid, that deſtroying contingent remainders was a wrong, and that he would make a precedent if there was none. That precedent was afterward ſolemnly made in *Manſel* v. *Manſel*, where a court of equity went farther than ever, holding a purchaſer to be

2 Sal. 680. P. C. 308. 1 Will. 128.

(o) 3 Atk. 751, S. C. 2 Eq. Ab. 759. Ante 264, 476. 1 Eq. Ab. 400.

be a truſtee for a contingent remainder-man. Every one doing it with notice is affected with the truſt; and if the eſtate is got into ſuch hands as not to be followed in equity, the court would make the truſtees liable for the breach. Thus it is on inheritances of land: a tree growing on the eſtate, is as much part of the inheritance as a houſe or the land; and as to the perſon intereſted, ſelling the timber is as much to the deſtruction of his inheritance as ſelling the land. Though no remedy at law, the truſtees might have complained in equity, that they were to preſerve the contingent remainders which might be *in eſſe* perhaps in a year, and that the court ſhould not ſuffer the preſent tenant for life to be guilty of that permiſſive waſte, becauſe it is a prejudice to one who may be *in eſſe*, and was intended by donor to have that, which is *in eſſe*. Though no precedent for this, yet in many caſes will the court prohibit waſte, though no action of waſte lies. If then then the court would do ſo, as being a wrong, the truſtees neglecting their duty, or not knowing it, will not alter the caſe ſo as to prevent that ſatisfaction conſequential to an injury.

LORD CHANCELLOR.

I know no caſe, where the truſtees might bring ſuch bill: though I have heard it ſaid, they might; and if this is ſo in caſe of a donee, it might be ſo in caſe of a purchaſe.

For plaintiff. In caſe of a purchaſer it would be contrary to common juſtice, if the truſtees might not bring ſuch bill; for then a man might immediately deſtroy the ſettlement he had made. Several injunctions have been granted, where no action of waſte could be: as in caſe of an intermediate eſtate for life: *Mo.* 554, where it appears, he in remainder could have an injunction ſo long ago as the time of *R.* 2. for waſte by the firſt tenant for life; as being an injury to his inheritance, taking away part of the value thereof. It is alſo an injury to the intermediate remainder for life, and as it takes away the benefit of the ſhade: ſo that on a bill by either, the court would interpoſe, and not ſay, you may bring *trover*; but would prevent the injury. Had this been the caſe of an infant *in ventre ſa mere* intitled to the inheritance, undoubtedly a bill would lie, though he cannot bring an action, ejectment, or trover, notwithſtanding he may be vouched. *Muſgrave* v. *Parry*, 2 *Ver.* 711. Then there is no reaſon but that a perſon, who may come *in eſſe*, ſhould have the ſame equity as one, who has a being of a month, if it may

may be ſo called. In *Abrahal* v. *Bubb*, 2 *Sho.* 69. (though a book of no authority) is cited a caſe called Lady *Evelin*'s, not reported in print, but in Lord *Nottingham*'s manuſcript; where it was ſaid, that where tenant for life, remainder to the firſt ſon for life without impeachment of waſte, remainder over, the firſt ſon by leave of tenant for life comes on the land, and ſells the trees, he was enjoined in this court by Lord *Nottingham*; though there could be no action at law. A bill may be brought by the patron of a living to prevent incumbent from cutting down timber: though the intereſt the patron has, is very little, nor any remedy in point of law; as he cannot enter, or ſeiſe the timber: but from his remote intereſt in the thing in poſſeſſion the court will relieve, becauſe the law does not effectually; and will not ſay, that you may go to the Biſhop. In *Fleming* v. *Fleming*, *July* 19, 1744, *Biſhop of Carliſle*'s caſe, tenant for 99 years if he ſo long live, remainder to truſtees, to ſupport contingent remainders, remainder to another for 99 years, if he ſo long live, without impeachment of waſte, remainder to his ſons ſucceſſively in tail-male, remainders over: both tenants for 99 years, thinking they had an intereſt together to cut down, becauſe the ſecond had a right to do ſo if in poſſeſſion, agreed to ſell the timber and divide the profits, as here: on motion for injunction your Lordſhip granted it; holding that there was no remedy at law; and that the privilege of *without impeachment* muſt be conſidered as annexed to the eſtate, when it comes into poſſeſſion. In *Litton* v. *Robinſon*, 12 *December*, 1744; teſtator deviſed an eſtate to his eldeſt ſon and his heirs; and if he ſhould not live to attain twenty-one leaving no iſſue; deviſes it to his eldeſt daughter and the heirs of her body; remainder to his two other daughters ſucceſſively in tail; the children were all infants: the ſon within two years of twenty-one, petitioned to cut down timber, being for his benefit, as owner of the inheritance though ſubject to that contingent intereſt to his ſiſters: your Lordſhip refuſed it; but left him to do what he could according to law: upon that the parties agreed, that ſome ſmall timber ſhould be cut down, and then a bill ſhould be brought by the daughters upon their contingent intereſt to prevent the waſte; which was done: and though that was a remote and improbable contingency, the court thought, the felling timber ſhould be ſtaid: not that the defendant could not do it in point of law; for he had an eſtate of inheritance; and every ſuch eſtate carries a right to cut timber: yet did the court reſtrain him, and ſaid, that if an eſtate deſcended to an heir at law, where an executory deviſe was depending,

(526)

depending, that heir, notwithſtanding he would have the legal eſtate of inheritance in the mean time, till the contingency happens, ſhall not be ſuffered, for the ſake of thoſe perſons who may come to be intereſted to fell in the mean time. But the defendant is not tenant in tail in poſſeſſion; and therefore could not do it, though no ſon was born at the time. It was not a remote contingency:
11 Co. 79. and it was determined in *Lewis Bowle*'s caſe, that if a ſon is born, the eſtate ſhall open. If then there might have been that preventative remedy by injunction, there ought
(527) to be this compenſating remedy ſuppoſing the act done. But it may be ſaid, though *fieri non debuit, factum valet*; for that by the ſevering the property it veſted in defendant as tenant in fee. If ſevered by act of God, as in the caſe of *Welbeck* park, where timber blown down on the Duke
2 Wil. 241. of *Newcaſtle*'s eſtate, it would be ſo from the rule of law, which ſays, that a tree lying on the ground ſhall not be in abeyance, but go to the firſt owner of the inheritance who might maintain *trover* for it: but this is not ſo ſevered; for they knowingly contrive the injury. If allowed, it will be in the power and the intereſt of tenant for life to bargain with a remainder-man though ever ſo remote, by giving him ſomething he could not be intitled to at all; which would encourage theſe colluſive agreements. (p) So one made tenant for life on his marriage, reverſion to himſelf in fee, being intitled to all windfalls, might immediately ſtrip the eſtate. There is no acquieſcence or length of time here; which might amount to waver of right, or afford preſumption of evidence in doubtful caſes: but the plaintiff was not born till 10 years after; not being of age till 1745, and purſued it recently. There is no difficulty on defendant in point of evidence from length of time: but if there was, he muſt have ſeen it could not have ariſen till at a diſtance.

For defendant. This is a new caſe: and as admitted, not well founded on law, ſo neither is it in equity. Defendant on application by plaintiff's father agreed, provided reaſonable ſatisfaction was made to him, not to take the advantage of felling the timber, which he might; the bill then is not proper againſt him without the repreſentative of the father. At law no writ of prohibition or action of waſte lay againſt tenant for life or years, as the parties muſt provide for that: ſince the ſtatute of *Gloceſter* indeed it is otherwiſe. But to whom could defendant be reſponſible? Not to the plaintiff had he been born; for in

(p) 1 Brown 196.

in point of law, if he was a ſtranger (as a remainder man in fee is as to privity between him and tenant in tail) he was liable only to leſſee for life or years, who was reſponſible only to the perſon having a right to bring the action of waſte; and remedy was left over againſt the ſtranger; againſt whom the action of waſte could not be brought; as held by Lord *Coke*. Next, this is a perſonal tort, which dies with the party, who alone was liable: then it would be extraordinary, if the repreſentative of the party committing waſte ſhould not be liable, that the defendant (who was never liable to the perſon, who could bring the action, nor even to the leſſee for life or years, if living, as the waſte was with his conſent) ſhould now account for that waſte. It is admitted, that if blown down or cut without concurrence of defendant he would be intitled to the benefit of the whole: how then is it the act of defendant? It is ſingly the act of leſſee for life. Suppoſe, the leſſee had given defendant ſo much money not to take the benefit of it: he might have done it for a conſideration, or for none at all; for why may not one renounce a right? And this amounts to the ſame. Though this court will (528) interpoſe to prevent waſte, yet never where the eſtate has ceaſed in the perſon committing it. In *Jeſus College* v. *Bloom*, 19 *November* 1745, the plaintiffs had made a new leaſe to another; and, diſcovering afterward that the former leſſee had cut down timber, and committed waſte, brought a bill againſt him for account thereof: your Lordſhip diſmiſſed it; for that where a leaſe determined, and poſſeſſion was quitted, the court will not decree an account; though, where the leaſe continues, it would decree an account of waſte as incidental to that juriſdiction, the court has, to prohibit and enjoin it. As ſoon as ſevered, the property belonged to defendant, who might have ſeiſed it, or brought an action without ſeiſing; for the father certainly had no other property than a ſpecial intereſt in the trees, while they continued annexed.

LORD CHANCELLOR.

Suppoſe, the truſtees had been vigilant, and brought a bill to ſtay this waſte, and prayed an account of the timber ſo felled under this agreement; I think, that would be a proper bill: and if the court had made a decree, there would be an injunction to ſtay the waſte; and, incident to that, the court may decree an account of the waſte already committed: what would the court have directed to be done with the money raiſed by the timber ſold?

For

For defendant. The money even by the aid of this court would be decreed to defendant. *Udall* v. *Udall, Alleyn* 81, and ſeveral other caſes ſhews that the very cutting veſts the property in the firſt owner of the inheritance. If there had been an intermediate veſted remainder for life, it would make no difference; for the defendant might then have ſeiſed, or brought *trover*, though not an action of waſte; and after death of the intermediate tenant might have brought *waſte* for the waſte in life of that tenant. But it has never been determined, that the intermediate eſtate of the truſtees ſhould bar the remainder in fee from an action of waſte, or take away a legal right; which, it is admitted, that would not do, if they were blown down. This eſtate in truſtees took riſe on political conſiderations in the time of the civil wars to prevent any act wrongfully done to put a period to the eſtate; and being created to one particular purpoſe, ſhould not be wreſted to another, or take away a remedy given to the owner of the inheritance by the ſtatute. If the remainder man in fee by action of waſte recovers the place waſted, the remainder
(529) coming *in iſſue* cannot recover this eſtate veſted; as held in the caſe of *Lincoln College*. This court will indeed under particular circumſtances at the inſtance of truſtees hearken to complaints by them; and has gone ſo far in *Manſel* v. *Manſel* as to declare, what its ſentiments would be in caſe of a breach of truſt, where the truſtees joined: but ſuppoſe they had joined, and been parties to theſe articles; they would not have made the legal right of the parties in the timber when cut, different: but they did not join, nor file ſuch bill to ſtay waſte: and there is no inſtance, where the court ever interpoſed on their omitting to act. If by ſuch omiſſion a benefit accrued to another, the court never interpoſes to take it away, there being inſtances to the contrary: as in *Partridge* v. *Pawlet*, *Hil. Vac.* 1736, before your Lordſhip, where plaintiff's wife tenant for life without impeachment of waſte, being a ſickly perſon, was going to cut down timber, to the produce of which ſhe would be intitled; a bill was filed on behalf of her ſiſter to reſtrain her, for that the eſtate was ſubject to debts in aid of the perſonal, which would probably not be ſufficient for that; the court granted the injunction. But, there being no deficiency in the perſonal, a queſtion aroſe after the wife's death between her huſband and adminiſtrator and the ſiſter, at whoſe inſtance the injunction was obtained upon an untrue ſuggeſtion, whether the eſtate ſhould be put into the ſame condition, as if no ſuch injunction had been granted? The court expreſſed an inclination to do ſo, if it could; but though it was a very hard caſe, and a miſ-

fortune

fortune happening by act of the court taking away a power annexed to the tenant for life, yet as an intereſt was by that means attached in a third perſon, the court did not think itſelf impowered to take away that right. Then much leſs will the court, where by the non-oppoſition of the truſtees, a benefit accrues to a third perſon. *Whitfield* v. *Bewit* is a little defectively reported. It ſeems there as if there were truſtees to preſerve, &c. and if there were, that caſe is a direct authority. 2 Will. 240. 3 Will. 267.

LORD CHANCELLOR.

Partridge v. *Pawlet*, is not applicable to the preſent caſe.

This is of the firſt impreſſion; of great conſequence and importance in point of precedent: therefore I will take time to conſider of it. *Supra* 546.

(530)

Parker *verſus* Philips, *Auguſt* 1, 1750. Caſe 214.

At the *Rolls*.

EDMOND PARKER in 1679, being ſeiſed of a very large real eſtate, on the marriage of his eldeſt ſon *George*, and in conſideration of a marriage-portion, he was to receive, ſettles his paternal eſtate to uſe of himſelf for life; remainder to truſtees for 200 years; remainder to *George* and the heirs-male of the body of him and his wife; with ſeveral remainders over. The truſt of the term was declared to be after death of *Edmond*, that the truſtees ſhould raiſe 1500*l.* by the profits or fines, and pay 500*l.* in ſix months, and the 1000*l.* in twelve months, to ſuch perſon as he ſhould by his will appoint: and if no appointment, the term to be void.

Bill for a ſtrict ſettlement after long acquieſcence by plaintiff's anceſtor, and when impoſſible to bar the remainder, diſmiſſed.

He had another ſon *Thomas*, on whoſe marriage he advanced him 3000*l.* which was afterward laid out by *Thomas* in purchaſe of lands.

In 1680, *Edmond* made his will; directing the 1500*l.* to be raiſed and diſtributed, as to 600*l.* part thereof (which alone was material to the preſent queſtion) to be paid to *Thomas* within three years of his, the teſtator's deceaſe, and his (*Thomas*) ſettlement of the lands, (mentioning them by name) purchaſed by *Thomas*, on the heirs-male of his

his body, and in default of ſuch iſſue on the right heir-male of him the teſtator.

Edmond died in 1691; the money not being due till three years, 400*l.* part of it was paid then to *Thomas*; and a receipt now produced, ſigned by him, acknowledging the receipt thereof in part of the 600*l.* given him by his father in his will. In 1700 the other 200*l.* was paid; and then a receipt taken of 200*l.* from his brother *George*, which with 400*l.* received before was in full of the legacy of 600*l.* given by his father's will.

Thomas married about 1676; and had iſſue male and female: and the iſſue male was proved to have exiſted till about 1705, and then failed. *Thomas* did not die till 1742; *George* ſurvived him about ſix months.

The eldeſt ſon of *George* brought his bill againſt the coheirs of *Thomas* to have this ſettlement carried into execution; by which he would be intitled according to the directions of the will as right heir-male of the teſtator; which he was as well as heir-male of his father.

(531) There was no evidence, that *Thomas* ever offered to make the ſettlement, or of his being called on to do it.

For plaintiff. If a bill had been brought to have this ſettlement made at the time the 600*l.* was payable, a court of equity would have made a ſtrict ſettlement, that appearing the teſtator's intent; for wherever it ariſes on a will directory of a ſettlement to be made, though the will is conceived in the terms it is at preſent, the court will direct a ſtrict ſettlement, if teſtator intended it. Then it would have been to *George* for life; remainder to his firſt and every other ſon; and the long acquieſcence of tenant for life will not bind the remainder. Teſtator intended, the eldeſt line of his family ſhould be purchaſers of this eſtate under the terms and condition in the will, which is a condition precedent; and on condition of performing that, is the 600*l.* taken; as the receipts ſhew. The 600*l.* came out of *George*'s eſtate; which was as much leſſened, as the other eſtate was advantaged thereby.

For defendant. Although the method of ſtrict ſettlement was firſt introduced by Sir *Orlando Bridgman*, it was not much known till ſome time afterward about Lord *Harcourt*'s time: ſo that theſe laſt fifty years in marriage articles

articles (which are very different from a will; being made in conſideration of marriage, and a proviſion for children) the words *heirs of the body* have been carried into execution in ſtrict ſettlement becauſe it was thought odd to give the huſband a power of deſtroying the ſettlement abſolutely; but here, it being done twenty years before when that method little known, it could not be intended. The court has gone a ſtep further: carrying it into execution in ſtrict ſettlement in caſe of a truſt for a man for life, and afterward for heirs of his body; but never farther. For there is no inſtance in caſe of a will of a limitation for life, and afterward to heirs of his body, that a court of equity has determined it to be any thing but an eſtate-tail, where not of a truſt-eſtate. *Bale* v. *Coleman*, 2 *Ver.* 670, and 1 *Will.* 142, has been allowed by every *Lord Chancellor* ſince, and particularly by Lord *Hardwicke* in *Bagſhaw* v. *Spencer*; where his reaſoning turned the other way, and determined to be only an eſtate for life upon its being a truſt; diſtinguiſhing it from a will where no truſt. If then an eſtate tail would have been made according to the words of this will, if a bill had been brought for a ſettlement, a court of equity, which does not care *quieta movere*, will not after ſo long acquieſcence, and lying by fifty years ſeeking the benefit of this contingency, ſuffer an eſtate to be diſturbed, when this might have been cut off. As to the condition, it is either to prevent an eſtate's veſting, or to diveſt an eſtate: and it does indeed ſeem a condition precedent: but every condition is to be taken ſtrictly. *Latch.* 40, 2 *Leo.* 335, ſo that on bond to do an act executor is not obliged to do it, becauſe it is perſonal. There was no obligation to pay the 600*l.* till the act was done: and the not doing it is an evidence it was never intended to be done, and becauſe it was of no uſe; for there can be no pretence that this pittance ſhould be ſettled in a more ſtrict manner than the bulk of the eſtate. Nor did *George* think he had a right to demand this ſettlement to be made; for when the plaintiff a little before the death of *Thomas*, told *George*, he had got a copy of his grandfather's will, by which the plaintiff would be intitled to this eſtate, *George* ſaid no, for that his uncle was tenant in fee of that, having purchaſed it to him and his heirs.

Ante. 12 November, 1748.

(532)

Sir *John Strange*.

This is a caſe of a very extraordinary nature: and if the plaintiff is intitled, the court will relieve; but will not lend aſſiſtance, unleſs ſuch title appears. The ſum to be

raiſed by the truſt-term was not to be diſtributed among children : but it was a general power to charge the eſtate therewith. Though this eſtate was purchaſed with the money advanced by *Edward*, it appears not that ever any ſettlement of it was made by *Thomas*; and it looks as if underſtood in the family, that no ſettlement was made; becauſe by the will on which the queſtion ariſes, the father put terms on his ſon; which he could not, if the eſtate had been under ſettlement before : but he conſidered it as in his power at that time. It does not appear either way as to the terms mentioned in the will; there being no evidence that *Thomas* ever offered to make the ſettlement, or of his being called on to do it. To judge on the whole circumſtances of the caſe other matters are introduced, and evidence laid before the court giving account of the ſituation of this family during the ſeveral periods. There being iſſue-male of the body of *Thomas* at the time of payment of the money, it is probably accounted for, why no demand of the ſettlement was made, while that iſſue ſubſiſted : but not ſo probable, that it would not have been ſet up afterward, on failure of the iſſue-male, if proper to be inſiſted on.

Firſt, as to the conſtruction to be put on the will, on the condition or proviſo for ſettlement of land. Suppoſe, at the time the money was to be paid by *George*, he had inſiſted, as he might, on the ſettlement being actually made, before he had advanced the money; ſo that they had been adverſary, and *Thomas* forced to come into this court for the payment : the court would not have decreed it without performing the terms of the will; and, as this will is penned, would never have conſidered it a proper execution for *Thomas* to have made himſelf tenant in tail directly; becauſe by the words he is not to ſettle it to himſelf and the heirs-male of his body; but on the heirs-male of his body, (533) which differs it from all the caſes cited; there being no proviſion at all of what ſort of eſtate he ſhould have himſelf; therefore he cannot be ſaid to perform that condition by making himſelf tenant in tail, by which he might immediately have cut off the heirs-male of his body : ſo that to have ſettled it effectually he could only have interpoſed his only eſtate for life; becauſe during his life it could not be known who would be heirs-male of his body : but that would be all. But on the next proviſion I cannot think with the plaintiff, that *George* under this will ſhould be made only tenant for life. It is to the right heirs-male of him the teſtator : but *George* and his iſſue were not particularly

cularly in view at that time. In the ſettlement *Edmond* himſelf made, he had not made *George* tenant for life, remainder to his firſt and every other ſon, but tenant in tail, remainder over to the other brothers in the ſame manner; and had a mind to connect this to the reſt of the eſtate, which would have been the ſettlement, the court would have directed, had this been litigated at the time the 600*l.* was payable or demandable.

Then as to the acquieſcence of *George* from the death of his father and payment of the money; ſuppoſing him tenant in tail; for if he had only an eſtate for life, no acquieſcence of his could bind his iſſue. There was no occaſion to point out *George* or any other, but let the remainder fall where it would. If *George* was intitled to have called for that ſettlement, and never thought proper to do it, (which, while iſſue-male ſubſiſted, is accounted for; as they might on coming of age have ſuffered a recovery, and barred the remainder to right heirs of *Edmond*), his not ſetting it up afterward on failure of iſſue-male ſhews, he underſtood, that this eſtate, notwithſtanding the receipt of the 600*l.* was to remain in the family of *Thomas*, and as a proviſion to be diſpoſed of by him for the reſt of his family as he ſhould think proper: and that he underſtood it ſo, appears from his anſwer to the plaintiff; which he never would have made, if he ever intended to have it ſet up. The length of time is indeed very material: and it would be of very miſchievous conſequence, if a demand of this nature at ſuch a diſtance, which plaintiff's anceſtor never inſiſted on, but ſeemed to have waved, ſhould be allowed to the total diſheriſon of every other branch of the family; there being no other proviſion if ſtript of this eſtate, for which the bill is brought. The court cannot indeed weigh the propriety of demands of this nature, and ſay, it is hard to ſtrip a perſon of that little by one who has a great eſtate. If a clear right, it muſt depend on the honour and conſcience of the perſon making the demand: but the only uſe I make of it, is, that it induces me to think, this was from the circumſtances of the family waved, and probably out of compaſſion to his brother.

It is too hard therefore to decree this for the plaintiff, who comes now, after it is impoſſible to bar it: much leſs will I decree the 600*l.* to be repaid. So that the bill muſt be diſmiſſed. (534)

Caſe 215. Attorney General *verſus* Whorwood, Auguſt 2, 1750.

Whorwood *verſus* Univerſity College, Oxford.

CAPTAIN *Thomas Whorwood* on his marriage with a daughter of Sir *Nicholas Waite*, being to receive a large portion with her, agreed, that it ſhould be ſettled for her benefit for life; and afterward, if no children, it was to come to himſelf. Afterward on the death of a ſiſter, an acceſſion of fortune came to her, to ariſe by ſale of her father's eſtate; which was veſted in truſtees, who were to raiſe certain ſums of money out of the eſtate, and afterward to divide the reſidue among his three daughters. She joined in levying fine for a ſale of this eſtate, *Henry Halſey*, a truſtee in the marriage-articles, and who had married the third daughter, acted in the ſale, and received the whole purchaſe-money; not only his wife's ſhare, but that of Mrs. *Whorwood*. Captain *Whorwood* gave a receipt to *Halſey* for his part of the purchaſe-money paid for the eſtate; which he thereby promiſed and agreed to lay out purſuant to the truſt repoſed in *Halſey*.

By his laſt will he deviſed the remainder of his real and perſonal eſtate to the college; and by a codicil annexed particular regulations, *viz.* that if there be a ſenior fellow of the college, who muſt be a divine, of the age of forty, in all reſpects of good repute, he ſhall be the poſſeſſor of all his eſtate, and furniture of his houſe at *Denton*, to keep it in repair; not to fell timber without conſent of the college; to live in his houſe hoſpitably; and ſometimes give entertainment to the poor; to diſtribute cordials and drugs to them, when needful; to give to them ſome books and pamphlets of good morals and piety; and to give an annual entertainment to the fellows: if he prove diſſolute, then the election to be void, and another proceeded to.

Charitable uſes.

On the information at relation of the college it was argued, that a deviſe to a college generally is always conſidered in this court as a proper charitable diſpoſition; becauſe they are bodies of univerſal extent and benefit to mankind: it was therefore on the moſt valuable conſideration. What followed, were only regulations by the teſtator, in which, if any difficulty, they might be ſettled by proper authority: and though ſome of them ſhould be abſurd, that would not

not make deviſe to the college void. The direction for taking care of the poor, being confined to a particular diſtrict, is not like Colonel *Norton*'s will; which was to take care of the poor and lame, halt and blind, in general. But this being now eſtabliſhed to be a valid will in point of law, the particular directions and regulations will not make it void. (535)

Againſt this it was inſiſted, this was no deviſe to a charity, or to a ſuperſtitious uſe. If this is to be eſtabliſhed, it is, as this court repreſents the crown; on which this application is made to give an approbation of this charity under teſtator's regulations. Is this ſuch a ſort of uſe, as ought to be eſtabliſhed by a court of equity for ever? The 43 *Eliz.* has made good deviſes to colleges upon an encouragement for learning; if this is a deviſe of that nature, it would be within that ſtatute, which has defined, what ſhall be a charitable uſe. Though ſome uſes not exactly within thoſe words have been determined within the ſtatute; as the leaving money, or an eſtate for maintenance of a preacher (which from its own nature is ſo, as for the propagation of religion), yet are they very few; for other purpoſes have been endeavoured to be brought within it, which have been refuſed; 2 *Ver.* 487, and ſome uſes that were indifferent in themſelves, or for benefit of mankind in general; 2 *Sal.* 605. Though this is to the college, and the eſtate veſts in it, it is not for the benefit thereof in general as a body, but for particular purpoſes in the annexation to his codicil, which he calls his regulations; which is only giving his eſtate in *mortmain* to a perſon to live on it in the manner the owner ſhould have done. The duty is to be beneficial to the poor in ſome, not in any certain degree. To live hoſpitably is the duty of every one, who has a good eſtate. He is to continue ſtill a ſenior fellow, nor to do any act which ſhall avoid his fellowſhip. In this college celibacy is required, and reſidence: whereas the nature of this inſtitution is to draw him from the college: which is not for the benefit of learning within the ſtatute of *Eliz.* nor has it any tendency to religion. The only thing, having a turn towards charity, is the entertainment of the poor; which is not an act of charity, (although relieving their neceſſities is), but rather luxury: beſides it is only to be done ſometimes, quite unlimited. The adding a tincture of charity merely to make that good, which otherwiſe would be void, will not do. There is indeed a clauſe in this will, which might be interpreted to be a deviſe of thea dvowſon of the college, and the eſtate given

given in augmentation of the advowſon; the clauſe is "in caſe of vacancy by death or otherwiſe, the next ſucceſſor ſhould officiate as pariſh-miniſter, and ſo on from one to the other." The general word his *eſtate* will indeed carry the advowſon: but teſtator only meant a voluntary officiating, till the living was filled. He is never named in the will incumbent of the living, but poſſeſſor of this eſtate. The truſt is to take effect immediately on death of teſtator's wife, whether it was then vacant or not. If
(536) he proves diſſolute, the college is to deprive him: but by augmenting a living a power of deprivation cannot be given to any other than the biſhop of the dioceſe. This will may be void for the uncertainty in the method of election. When a man will ſettle his eſtate in this odd, whimſical way, the court ought not to eſtabliſh it: it is locking up property, which is againſt the policy of the law of *England*. The court has refuſed carrying into execution a particular turn of mind, though it was not a ſuperſtitious or illegal, but an indifferent uſe; as to feed ſparrows, *&c.* eſpecially as this is for ever. It would be a reproach to a court of juſtice and policy of the nation to ſuffer keeping up for ever a truſt for ſuch a purpoſe as that or as this, which is only a charity *ad bibendum et edendum*. In *Attorney General* v. *Oakaver*, *February* 1736, the *Maſter of the Rolls* eſtabliſhed a ſtipend given to keep up an organ and for the organiſt: but as to 40*l. per ann.* to the choriſters he refuſed it: on appeal your Lordſhip affirmed the decree; as the choriſters never were allowed in parochial churches.

Lord Chancellor ſaid, what he went on was, that it was contrary to the conſtitution of the church of *England* to have them in parochial churches: and that they would be under no rule of government as they are in other churches; and the law would not allow they ſhould be under the government of the heir at law. ——

If this is no charitable or public, but a ſuperſtitious uſe, it reſults to the heir at law, Sir *James Markham*. The legal eſtate veſts indeed in the college; but a corporate body may be a truſtee. Superſtitious uſes go to the King by *ſt. H.* 8. not for benefit of the crown, but to diſpoſe of them to other charitable uſes of the like nature. Their veſting in the crown is, from their being all good uſes as religion ſtood before the reformation; but that is the caſe only, where it is really a ſuperſtitious uſe; for where it is an improper or illegal uſe, as this, it is void,

and

and veſts not in the crown: as in the caſe of *Oakaver*, who enjoys the land free from the 40*l. per ann.* the court not directing it to be given to the crown.

LORD CHANCELLOR.

If this truſt is no charity, there is no ground for the information in the name of the attorney general at the relation of the college on a deviſe to the college only; for ſuch information can only be ſupported on the foot of a charitable uſe. On a general deviſe to the college without more, the college being a body capable of taking muſt ſue; the *Attorney General* having nothing to do with it; and it is only before me on that information.

(537)

How far a deviſe to a college is a charity.

As to the truſt, created by theſe regulations on the deviſe to the college, I will give no opinion at preſent; it is a matter deſerving conſideration, and ſhall come before the court on all the circumſtances of the caſe. The eſtabliſhment of learning is a charity; and ſo conſidered on the ſtatute of *Eliz.* A deviſe to a college generally for their benefit, to increaſe the foundation, and advance the end of the inſtitution, to augment a Headſhip or Fellowſhip, or found a new one, is a laudable charity, and deſerves encouragement; and therefore they were excepted out of 9 *G.* 2. but this is not a deviſe of that kind for academical, collegiate purpoſes: but only to eſtabliſh ſomebody to live at his houſe at *Denton* for ever, and to make his eſtate unalienable; anſwering no good to the college or the public, ſo far as it appears at preſent. It is neceſſary therefore for the court to conſider materially, what may be the effect and operation thereof; how far good in itſelf; and if not, what may be the conſequence of it, as to any power in the crown to give direction to the uſes of a charity improperly provided for in itſelf; as was done in *Attorney General* v. *Baxter*, 1 *Ver.* 248, where Lord *North* held, the truſt did not reſult to the heir at law, the crown having power to direct in what manner it ſhould go; and it was directed to *Chelſea college*. On a rehearing (before which the act of toleration paſſed) the court held, the charitable uſe was not contrary to law; and reverſed the decree: but nothing was ſaid againſt his opinion, that the power of directing came to the crown, if the truſt was not ſupportable as a charitable uſe: But this I will not determine now, it fully deſerving conſideration; and it is neceſſary to know the effect of the deviſe itſelf; how far his direction for fixing a ſenior Fellow and providing for him in this manner

Where the crown may direct the uſes of an improper charity.

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ner is inconſiſtent with the conſtitution of the college as to reſidence, &c. for if ſo, it is contrary to the intent of this truſt; which was, that he ſhould be a continuing Fellow of this college, not barely when he is elected. Then a point will ariſe, if this is not a good charitable uſe within 43 *Eliz.* it will ſtand as a deviſe to the college generally; it will be to a body capable of taking; which will depend on the power they have, to take in *mortmain:* and it is neceſſary to be inquired into, how far they can do ſo, that the whole may be before the court; when the truſt comes to be determined. The Maſter therefore muſt inquire into that, and whether the regulations are inconſiſtent with the college-ſtatutes; and reſerve the conſideration of the validity and operation of the truſt till after the report.

The next conſideration was, what related to Mrs. *Whorwood*, teſtator's widow: principally as to what was to be laid out for her benefit under the marriage-articles, or under any agreement of the huſband. She by her croſs bill demanded, not only to have a ſettlement on her for life of the eſtate at *Denton*, which had not yet been ſettled according to the articles, but alſo to have the lands and tene-
(538) ments purchaſed with the ſhare, ſhe was intitled to out of her father's eſtate (which was agreed by the articles to be ſettled) and alſo that ſhare which came to her on death of her ſiſter, ſo ſettled; inſiſting, that by the note her huſband gave to *Halſey*, there was a declaration of truſt, or at leaſt an engagement binding him and all claiming voluntarily under him, that the whole money ſhould be laid out according to the truſt in thoſe articles; it extending to the whole, there was ſome conſideration for it; it was a reaſonable act: if he had come to have a ſale of that truſt-eſtate, and that the ſhare ariſing from the ſale belonging to his wife paid to himſelf, the court would not have let him had it, if the wife or her friends had inſiſted, there was a narrow proviſion made on her on the marriage, and therefore a further ſettlement ſhould be made.

This was not oppoſed as to her father's lands; but it was inſiſted, ſhe was not intitled to have the benefit of the other part ariſing from her ſiſter's death, by ſettling it in like manner; becauſe not within the articles, nor ſufficient proof of any ſuch agreement extended to that, as would bind thoſe in his place: nor ſufficiently put in iſſue, if there was any new agreement for that; the bill putting in iſſue only the articles, and the rights ariſing under

under them, and nothing of this note. It is to be confined to truſts in the articles: the wife levied a fine, before the money came into the hands of the truſtee: then the money coming in lieu of the eſtate is abſolutely the huſband's, and the court will not ſuffer the perſon, into whoſe hands it comes to retain it, and ſay a ſettlement ſhould be made on the wife.

LORD CHANCELLOR.

(q) It has unfortunately happened, that the affection, which at firſt ſubſiſted between the huſband and wife, did not continue; and ſhe has been hardly uſed; which, though it will not alter the juſtice of the caſe, is a reaſon, that things ſhould not be taken againſt her in a ſtrict, harſh conſtruction. The note is not ſtrictly put in iſſue; but ſufficiently for this purpoſe: and it would be to no purpoſe to put this off on any ſuch defect ſo as to require a ſupplemental bill, if I ſhould be clear in the point of right, as I am. Though there is no particular charge in the bill, yet in the interrogatory part there are queſtions relating to it: whether teſtator did not by ſome note acknowledge, he received that money, and agreed to lay it out in this manner. The rule is, you are not only to queſtion in the interrogatory part, but make charges in the charging part; otherwiſe you cannot except: but the defendant, though not bound to anſwer to it, has done ſo; which being replied to, it is put in iſſue properly; conſequently that informality in the manner of charging (for it is no more) is ſupplied by the anſwering to it; for a matter may be put in iſſue by the anſwer, as well as by the bill; and if replied to, either party may examine to it. Which brings it to the queſtion of right; and I am of opinion, this note is ſufficient to bind the teſtator, his repreſentatives and claimants under his will, to a performance of what is there agreed to. A man may as between himſelf and his wife make an agreement or declaration of truſt in his life; which though not for valuable conſideration, ſhall take effect as againſt his executor or adminiſtrator, or thoſe claiming voluntarily and in repreſentation under him: of which there are ſeveral caſes. In a caſe relating to Lady *Cowper*'s eſtate, before Sir *Joſeph Jekyl*, ſeveral things of that kind of gifts by Lord *Cowper* in his life, were eſtabliſhed to belong to her, and to paſs by her will: though they could not take effect againſt creditors, yet they

If huſband can lay hold of wife's eſtate without aid of equity, he is not compelled to ſettle it, otherwiſe where he cannot.

(539)

Voluntary agreement by huſband, good againſt his executors, though not againſt creditors.

(q) 2 Vol. 17.

they ſhould take effect, unleſs ſome imperfection in the inſtrument in point of law: which there is not in the preſent caſe. Then as to the conſtruction and extent of the note, I think it was a reaſonable act for him to do: and it is truly inſiſted, (t) that on his application, for the money the court would undoubtedly have ordered a further ſettlement. If then they did not come into court, but acted among themſelves, and the huſband has agreed to do that, which the court would have directed, had the wife inſiſted on it in a proper ſuit, it ſhould have its full effect. Though it does not appear in the cauſe, that the wife had levied a fine, before this money came into the hands of the truſtee, as it is ſaid; yet that muſt be to ſatisfy the purchaſer, as ſhe was married: but I will not divide one act from the other, but take all as one tranſaction; and that this note though ſubſequent is an evidence of what was the agreement and intent, *viz.* that this money ſhould be laid out in purchaſe of land to be ſettled to the ſame uſes. The circumſtances warrant that conſtruction; the truſtee in the marriage-articles being the proper perſon to intervene and receive the money ariſing by ſale of that other ſhare, and to ſee the articles performed for her benefit. He receives the whole; the huſband coming to receive it out of his hands, it is on ſuch a promiſe: which is an evidence of the terms on which the money was paid to him, and of the agreement and intent on which the wife joined in the fine for ſale of this eſtate. It was reaſonable; and what the court would have obliged him to, had he come before it; for that is the diſtinction: if the huſband can lay hold of the wife's eſtate without aid of a court of equity, the court will not compel him to do ſo; as they will, where he cannot without ſuch aid; which is the preſent caſe. The ſum is particularly aſcertained, and includes both ſhares, as well that which ariſes on her ſiſter's ſhare as her original ſhare: and the promiſe is to lay out the whole of that ſum; which therefore, I am of opinion, muſt be laid out purſuant to the truſt.

(540) One under articles to purchaſe and ſettle, purchaſes by him ſhall go to make

Another queſtion was made as to ſome lands purchaſed by teſtator after marriage, but never ſettled, whether they ſhould not be conſidered as a performance of the covenant, he was under, to purchaſe land and ſettle on her for life: it being inſiſted on as a rule that where one is under covenant

(r) 3 Wms. 205. Lord King decreed ſo, but did not ſeem to approve of the practice, and ſaid, ſometimes it proved inconvenient, but that it was too long eſtabliſhed to be over-ruled, 1 Wms. 383. 2 Wms. 639. 3 Wms. 12. 1 Str. 239. 2 Atk. 417.

nant to ſettle lands, or to purchaſe and ſettle, if he leaves lands in their nature proper (for a reverſion will not do) which were his former eſtate, and deſcend after his death, or if he purchaſes, and does not ſettle, it will be conſidered (unleſs evidence to the contrary) *pro tanto*, or in the whole, a performance of the covenant, and purchaſed with that view; not on the head of ſatisfaction but performance: otherwiſe it would cauſe great confuſion in families. This has been before the court ſeveral times: firſt in *Wilcox* v. *Wilcox*, 2 *Ver.* 558. *Roundell* v. *Breary*, 2 *Ver.* 482. *Wilks* v. *Wilks* by Lord *Harcourt*; and a caſe before your *Lordſhip* on Mr. *Parſons*'s will: and *Took* v. *Haſtings*, 2 *Ver.* 97. for which your *Lordſhip* ſearched the regiſter 51[illegible], where there was a bond to charge lands of 100*l.* with 8*o*l. *per ann.* to his daughters, the obligor died, having two manors, without doing it: the court held, that one manor (not appearing whether purchaſed before or not) ſhould be liable; if that manor was purchaſed after, it is very ſtrong. Laſtly *Smith* v. *Deacon*, *March* 26, 1746, where firſt there was a demurrer, and your *Lordſhip* had a doubt whether *Lechmere* v. *Lechmere* had not gone pretty far: but was afterwards ſatisfied on the bill of review. It was an agreement between the huſband and truſtees. *Smith* in conſideration of 4co*l.* portion agreed to convey and ſettle houſes, lands and tenements or a rent-charge iſſuing thereout, to himſelf for life, to wife for life in bar of dower, to the heirs of his body upon her, in default of ſuch iſſue to the right heirs for ever, ſubject to a power to charge for younger children. After marriage he never made any ſettlement of the land or rent-charge; but purchaſed ſeveral little pieces of land, a piece of freehold of inheritance, another a reverſion dependant on a life: the queſtion was, (f) whether theſe purchaſes at different times and ſmall parcels, and ſome reverſions (from whence it was argued, he could not intend them in performance of the covenant) were a performance, or whether the covenant ſhould be made good out of his aſſets? Your *Lordſhip* mentioned all the authorities, particularly *Lechmere*'s, and held, that they ſhould be taken as an intended performance, and that thoſe lands ſhould be ſo ſettled. It was objected, that this would be affecting theſe eſtates as liens, which would follow them into the hands of purchaſers or mortgagees: the anſwer of the court was, that this depended on the intent; and the preſumption ſtood, that he

it good ſo far; but not of copyhold.

Cited in *Lee* v. *D'Aranda*, Ante.

(f) 3 Wms. 228.

he intended a performance, till the contrary was proved: but any act ſhewing he had not that in view, as a mortgage or ſale afterward, would take off the preſumption.

(541) But this was given up on the other ſide; as *Lechmere*'s and the caſes cited were too ſtrong: that if a perſon, obliged under articles to purchaſe, though not to the extent the articles require, that ſhall go to make it good, ſo far as it can be applied.

LORD CHANCELLOR.

It being admitted that the freehold eſtates purchaſed will be ſo applied, they muſt be ſettled on the widow for life; and afterward as to the purchaſes prior to the laſt will, they will paſs thereby; as to thoſe ſubſequent, after the widow's eſtate for life the reverſion will deſcend to the heir; but there are ſome copyhold purchaſed by him; which, not being ſurrendered to uſe of the will, in point of law deſcend. Theſe cannot be applied to ſatisfy theſe articles. I do not know, that on a general covenant to purchaſe the court has taken copyhold lands (unleſs ſome agreement for that purpoſe) to go to make good articles in this manner; being liable to different tenures and to forfeiture. Unleſs therefore they paſs by the will, they deſcend; which will depend on the penning of the will; and bring it to the queſtion of the charitable uſe; for if it is ſuch, it will be good by way of appointment. Yet I do not know any caſe where they have been made good as an appointment for benefit of a remainder-man. It depends on this: whether there are ſufficient words to take in copyhold lands? They are not mentioned: it is a general deviſe of real and perſonal eſtate; under which deviſe there is no inſtance, that copyhold ſhall paſs, if there is freehold to anſwer it; unleſs perhaps for creditor. But it muſt be inquired into to know, when theſe copyhold lands were purchaſed, before I can determine that.

Let the Maſter alſo inquire, what freehold were purchaſed after the marriage; and let what the teſtator paid for them be accepted and ſettled in lieu and ſatisfaction of ſo much, of what the widow is intitled to. Let the reſidue be conſidered as a debt on teſtator's eſtate to be laid out in purchaſe of lands and ſettled for her jointure; the remainder in fee to the two ſenior Six Clerks, not toward the cauſe, (a method which has been ſometimes taken) for the benefit

benefit of the perſon, who ſhall appear intitled. Let the widow have intereſt at four *per cent.* for ſuch money as ought to have been laid out, from her huſband's death.

As to the coſts at law, the deviſee is not intitled to coſts againſt the heir; for there are ſeveral caſes, where an heir at law diſputes a will both in law and equity, and yet ſhall have his coſts: and this is a very proper caſe for it. As to the widow, I do not think it was improper for her to diſpute the will: all parties therefore ſhould have coſts to this time out of the eſtate; but not to give her coſts at law: yet I will not make her pay coſts. Coſts.

(542)

Peat *verſus* Chapman, *Auguſt* 3, 1750. Caſe 216.

At the *Rolls.*

TESTATOR deſired all the reſt and reſidue ſhould be divided between two. That this was a tenancy in common was cited *Owen* v. *Owen*, 2 *March*, 1738, before Lord *Hardwicke.* 1 *Atk.* 494. (t)

Maſter of the Rolls ſaid, this muſt be underſtood to be equally divided: and by death of one in life of teſtator, his moiety ſhould not ſurvive to the other deviſee of the reſidue: but be conſidered as undiſpoſed of by the will, and divided among the next of kin, as if no deviſe had been thereof. Deviſe of reſidue to two by death of one in teſtator's life a moiety undiſpoſed.

Oats *verſus* Chapman, *Auguſt* 6, 1750. Caſe 217.

AN order made by Baron *Clarke* for allowing a demurrer was now reverſed: but defendant having immediately levied on plaintiff 5*l.* the coſts of allowing it, it was prayed, that in drawing up the order for diſallowing it, it ſhould be with coſts to be returned to plaintiff. Poſt. Vol. 2. 100, *Dec.* 8, 1750. Coſts on reverſing an order for allowing a demurrer, refunded.

Lord Chancellor had a doubt about it; for though a bill is diſmiſſed, a decree made, and coſts levied, that decree is reverſed on a bill of review or rehearing, though the principal is returned, he did not know, that in thoſe orders of reverſal, the court ever mentioned any thing of coſts. The plaintiff was now intitled to his coſts in ſome way;

(t) 1 Wms. 700. 2 Wms. 489. 2 Stra. 905.

Bill lies for ſpecific performance, though a remedy at law.

way; the only doubt was as to the method. The demurrer ſeemed to be allowed on an apprehenſion, there was a remedy at law by action upon a note in writing: but that certainly one might bring a bill for ſpecific performance of any writing; for one may have ſeveral remedies for a deed; as *trover*, or *detinue*; which is indeed partly a ſpecific remedy by delivery up of the thing: but ſtill he may make uſe of the greater remedy by ſpecific performance, which is ſuperior to that of damages.

A motion was afterward made, that the coſts ſhould be refunded.

(543)

Lord Chancellor thought it reaſonable; for that on reverſal of the former order, the parties were put into a ſituation, as if diſallowed originally: as on reverſing a decree for diſmiſſion of a bill on a rehearing.

Poſt. Vol. 2, 100, no precedent being found coſts were ordered to be refunded.

But the Regiſter, being conſulted, ſaying he knew no precedent of refunding, *Lord Chancellor* deſired him to ſee what the courſe of the court was on this occaſion: but tho' no precedent could be found for it, he ſhould not ſcruple making one; being agreeable to the practice of this and other courts, on reverſal of a decree or judgment in law.

Caſe 218. Ryder *verſus* Bentham, *Auguſt* 7, 1750.

MOTION for an order to pull down certain blinds ſo put up as to obſtruct plaintiff's houſes.

Injunction againſt ſtopping lights. Trial directed on motion.

Lord Chancellor ſaid, he never knew an order to pull down any thing on motion: it is ſometimes, though rarely, done on a decree. The court will indeed ſometimes on motion order the going on to be ſtopped: but the anſwer coming in laſt night, he deſired it ſhould be moved next day.

When it was argued, that the court might interpoſe inſtantly by interlocutory order to prevent that, (u) for which damages will lie at law, but which are not an adequate remedy. The court will order a building, which is erecting, not to be further proceeded in, though not directed to be pulled down; (x) as that might do irreparable miſchief to one

(u) 2 Brown, 65. (x) Such motion muſt be founded on preſcription or agreement. 2 Vol. 452.

one party, if on final hearing the right ſhould be with him: and on that ground will not ſtay the working a mine; but that is not the preſent caſe; for by order to reſtrain from going on it will be included, that this ſhall not ſtand. On a right to a water-courſe or ſalt-ſprings, if one working under ground diverts the ſtream, and on motion the court is of opinion, the plaintiff has a right to prevent the injury during the hearing; it will be ordered to go in the mean time as before: as his lordſhip held in *Lawton* v. *Lawton*, which came out of *Cheſhire*. It is only to keep things as they are, till a final determination.

Againſt the motion. The houſes lie in *Leadenhall Street:* and the cuſtom of *London* allows the building higher, and raiſing new houſes on ancient foundations higher, though it does obſtruct another light. *Yel.* 115. 1 *Bul.* 115. *Godb.* 183. and *Calthrop* 41. in which laſt caſe the cuſtom was held good, as it might ariſe on a lawful commencement in cities. There is ſome contrariety between the maxims *cujus eſt ſolum ejus, &c.* and *ſic utere tuo ut ne alienum læaas:* ſo that at leaſt it is a doubtful right: then the court will never interpoſe by injunction. But it is not doubtful according to this law, that the defendant has a right to build on this ancient foundation. (544)

It being agreed, that this muſt be tried, *Lord Chancellor* ſaid, the ſooner the better, and to grant an injunction in mean time: and then this ſcaffold ſhould be removed. Let the parties therefore by conſent proceed to a trial at law in *caſe* by the plaintiff, for ſtopping up his lights: and the defendant to pull down the ſcaffold, or polls and boards already raiſed, and be injoined from building or erecting, whereby any of plaintiff's lights may be obſtructed, till after trial had.

Gage

Caſe 219. Gage *verſus* Lord Stafford *and* Furneſs, *Auguſt* 7, 1750.

Where referred to a Maſter, whether two bills are for ſame matters; where not.

GAGE brought a bill againſt the repreſentatives of Mr. *Cantillon*; inſiſting that he was a creditor for a ſum of money ariſing from the ſale of his actions, depoſited in the ſhop of *Cantillon* and *Hughes* bankers at *Paris*, in 1720; to have an account of that tranſaction; and that what was raiſed out of his actions, ſhould be applied firſt to ſatisfy the demands of *Cantillon* againſt him; the ſurplus to himſelf.

Another bill was brought againſt him by the executors of the late Lord *Powis*, inſiſting, that this ſum was due to *Gage*, and claiming by an aſſignment with a defeaſance.

For defendant it was moved to refer to the Maſter to ſee whether both bills were not for the ſame matter, and that one ſhould be ſtopped; which is of courſe where under the ſame name; and the rule holds in this indirect manner of doing it, which is the ſame in effect, though by different perſons, and tends to more vexation than where both in the ſame name, as there muſt be different anſwers, and the examination in one cauſe cannot be made uſe of in another. The aſſignment was only fictitious; granted for a particular purpoſe: but if real, *Gage* has parted with his right, and they cannot at the ſame time carry on a ſuit as his aſſignees and a ſuit in his name. *Ceſtuy que truſt* cannot ſue in his own name and his truſtee's. The rule of the court is, that the ſame perſon ſhall not doubly vex the party: and the foundation of both bills is, that the eſtate of *Cantillon* is debtor to *Gage*; and it is ſworn, that both are carried on by the ſame hand, and ſame expence, and the ſame ſolicitor employed in both.

(545) Lord Chancellor.

Conſider the courſe of the court. If two actions at law are brought in the ſame name and for the ſame matter, the pendency of one may be pleaded in abatement of the other; but if two ſuch bills are brought, this court takes a more particular method; referring it to a Maſter to inquire whether both are for the ſame matter; and if ſo, may ſtop the proceedings in the laſt. Another caſe, in which the court is warranted to ſtop proceedings ſhort, is that

that of an infant; as where two bills by different *Prochein Amies*, the court will refer it to ſee, if for the ſame matter, and which is moſt for the infant's benefit, and will ſtop the other. But there is no other caſe, where the court is warranted to do ſo, where the bills are in different perſons names. I have indeed a ſuſpicion, that both theſe bills were ſet on foot by the ſame perſons for their benefit, and at the ſame expence: but it is not every ground of ſuſpicion that will warrant the taking extraordinary ſteps out of the courſe of the court, or the reſtraining a man in a country of liberty from ſuing as he pleaſes, unleſs it be within the courſe of the court to do ſo; which would be aſſuming an arbitrary power, and introducing a way of judging ſummarily, of the merits of the caſe, by referring it to a Maſter to inquire into the very merits touching the aſſignment; which is a precedent I ſhall never make. Where a defendant would not appear, and a ſequeſtration is proceeded to, it was very reaſonable, that the cauſe ſhould be ſet down, and the bill taken *pro confeſſo*: yet the courſe of the court did not warrant the doing it, till an act of parliament was made. But it appears plainly to me, that theſe two bills were not for the ſame matter: they are ſo indeed as to the foundation of the demand; but for a different equity; the equity of the executors being founded on the aſſignment, which being with a defeaſance is an aſſignment by way of ſecurity, and is not taken notice of in *Gage*'s bill. Compare it to other caſes; ſuppoſe a mortgage on a real eſtate, and a derivative mortgage or aſſignment thereof is made by the mortgagee: the aſſignee or derivative mortgagee may bring two bills to have a redemption or foreclоſure. I could not ſtop either of thoſe ſuits, though carried on by the ſame perſon, nay though the ſame ſolicitor employed (which is often done, and properly) I ſhould not refer it to a Maſter: yet when the cauſes came to be heard, that would be an ingredient in the conſideration of coſts; which the court would order to be paid for the vexation. Suppoſe it was at law: (and it often happens) a man may ſuppoſe a title in himſelf, to what is recoverable at law; but may be doubtful of that, and think, that if he ſhould fail in that action in his own name, he may prevail by bringing an action: in name of his truſtee: and there is no inſtance of the court's ſtopping either of (546)
thoſe actions; for one may bring two different actions in two different names to try his chance, on which he can recover. So it may be in this court; one may bring two bills at his own expence, making uſe of the name of his affignor in one; nor can the court ſay, he ſhall be ſtopt in one. In that, in which he does not prevail, his bill muſt

be diſmiſſed with coſts; and that is the remedy: but otherwiſe the court would take on themſelves beforehand the judgment of the merits, and the title on which it is beſt to recover. There being no precedent of that kind, the very foundation of the motion fails; for ſuppoſing both brought by executors of Lord *Powis*, and carried on at their own expence, I am not warranted therein, unleſs enabled by another authority: and when you can ſhew me an act of parliament for that purpoſe, I will do it.

Caſe 220. Garth *verſus* Sir John Hind Cotton, *Auguſt* 10, 1750.

Lord Chancellor.

Ante 524, 476, 264. 3 Atk. 751.

ALTHOUGH I have taken a great deal of pains, I cannot yet form an opinion from an apprehenſion of breaking in upon the rules of law, or eſtabliſhing a dangerous precedent in a court of equity. The caſe is admitted to be entirely new. The ſtrength of the arguments for the plaintiff is on the authority of *Pye* v. *Gorge*, and *Manſel* v. *Manſel*, where the court has conſidered truſtees to preſerve contingent remainders as truſtees to all other purpoſes ſo as to be affected by breach of truſt and all the conſequences: and therefore if they have been negligent in not bringing a bill to reſtrain the waſte, it ſhould not turn to the prejudice of the remainders, when *in eſſe*. But it deſerves to be conſidered, whether they have any truſt to preſerve the timber; becauſe their legal eſtate is not at all for that purpoſe; being only an eſtate *pour auter vie*; by which there is no intereſt in, or power over the timber; and which is at an end, as ſoon as the firſt tenant for life dies. It is ſaid, they might bring a bill for injunction to ſtay waſte, before the contingent remainders veſted; and I am of that opinion: but I do not know, that ariſes out of their truſt for the timber. It is a bill by *amicus curiæ*; as in a bill on behalf of an infant in *ventre ſa mere* to ſtay waſte. Till the eſtate attaches in poſſeſſion, they have nothing to do with the timber. If indeed there is a forfeiture for the firſt tenant for life, they would have a right to the ſhade, *&c.* but nothing to do with it during the life of tenant for life. This is no opinion; but only my doubts from the breaking in on the rules of law on one hand, and on the other the laying down a precedent in equity which might be dangerous. Let it therefore be ſpoke to again

next

next term. I can find no caſe where the court has preſerved the timber, though cut down by wiong, for benefit of the contingent remainders. In *Whitfield* v. *Buet* it (547) was not by accident, but by wrong; and though *Peer Williams* has not mentioned, whether there were truſtees to preſerve, *&c.* I have looked into it, and find, there were.

Michaelmas Term 1750, it was argued again.

For plaintiff. The bill is againſt the defendant only ſo far as he has been benefited himſelf by agreeing to this act, which is a detriment to the plaintiff's inheritance. The caſe is new in *ſpecie*, but the court will go on the general principles of law and equity. The whole merits depend on two points, firſt, whether on application by the truſtees at the time of agreement the court would have reſtrained them both, the tenant for 99 years from cutting by licence of the remainder-man, and the remainder-man from coming upon the eſtate by licence of the tenant? Next, if ſo, whether ſatisfaction ought not to be decreed for that act, when done, which the court would have prevented as againſt conſcience?

As to the firſt: To ſhew that the court would have done ſo, it is neceſſary to ſtate the notion of juſtice eſtabliſhed as to preſerving timber, houſes, mines, and other things capable of being in fact ſevered from the inheritance, and which yet are part of it in notion of law, and conſidered as annexed. There are but four caſes, in which a court of equity interpoſes to preſerve an inheritance entire: Firſt, where there is no legal remedy whatever, that extends ſo far as to anſwer the intent of the ſettlement, under which all claim, and from which intent it is clear, that what is doing is wrong. This holds, where tenant in tail *apres poſſibility*, *&c.* or wife tenant in tail *ex proviſione viri*, goes to pull down houſes or commit deſtruction. No action of waſte or of property can be brought, yet this court will enjoin; *Abrahal* v. *Bubb.* 2 *Sho.* 96, and *Cooke* v. *Whalley*, *Eq. Ab.* 400; becauſe the manſion houſe is ſettled as well as the reſt; and this tenant in tail *apres*, *&c.* is but tenant for life, who could not do it though he was ſo without impeachment of waſte. This is the moſt ancient juriſdiction of equity: in the time of *R.* 2. *Moor* 554, and ſeveral precedents in *H.* 8. and *E.* 6. but ſince the caſe of *Raby cattle* it is eſtabliſhed. There was tenant without impeachment of waſte, (which ſince *Lewis Bowles*'s caſe gives leave to commit waſte) yet would not this court

ſuffer it, becauſe contrary to the form of the ſettlement, though there was no legal remedy. On the ſame principle have been caſes as to an avenue in a park for ornament or ſhelter. Secondly, where there is a temporary impediment to the remedy at law, ſo that the act is at the time diſpuniſhable, equity interpoſes: as where there is an intermediate tenant for life, the remainder-man of inheritance cannot bring an action for waſte by the firſt tenant
(548) for life, for the ſake of the preſervation of the innocent remainder for life. 2 *Inſt.* 301. It is not ſo if it was a remainder for years, and it would not be deſtroyed by the action. But a ſtronger caſe is of an eſtate for life, remainder for life without impeachment of waſte, and with power to commit waſte; both agree to commit waſte; and though diſpuniſhable at law, yet this court would enjoin, on the principle that it was an injury to the inheritance, although it was a bare contingency whether it would be a prejudice to the owner of the inheritance or not; which was Lady *Evelyn*'s caſe. So in *Fleming* v. *Fleming*, though no remedy at law. The third caſe where there is a remedy in equity only, is, where a perſon, who may be conſequentially injured by the waſte, from the weakneſs of his eſtate has no remedy at all at law: as where tenant for life, remainder for life with or without impeachment of waſte, remainders over; on the bill of remainder for life, the court would reſtrain the firſt tenant for life from committing waſte: *Darrel* v. *Chamnys*. If guardian of infant tenant in tail cuts down the whole timber, the court will not on application of the remainder-man enjoin; which was *Savil* v. *Savil*; although the infant there was very ill, and did die, before he came of age: but if done in ſuch a way as to be to the prejudice of the infant himſelf, on application of the infant the court will judge, what is for his benefit. The fourth, and moſt material to the preſent caſe, is where new limitations are introduced and allowed by law and courts of juſtice, ſince the time that all the doctrine about waſte was ſettled. Since the ſtatute of *Gloceſter* courts of law cannot adopt their remedy to a new purpoſe: then the court interpoſes on the foundation of juſtice, and on the principle that, this new ſort of limitation being introduced, it muſt be protected in all its conſequences, becauſe the limitation itſelf the law allows. Executory deviſes and ſpringing uſes exiſted not before the time of King *Hen.* 8.: then none of the rules at law concerning waſte can be applied to them; and any man, having a fee ſubject to be defeated on contingency, may in point of law, pull down houſes, and cut down all the timber:

timber: no legal remedy, as action of waſte or *trover* for the timber, lies; nor a prohibition: but in equity there is a remedy. In *Litton* v. *Robinſon*, the inheritance being given over to the daughters on contingency, your Lordſhip thought the intent was, that the whole and every part of the inheritance ſhould be preſerved to wait that contingency: and that a bill may be brought for infant *in ventre* to ſtay waſte; the ſtatute of King *William* having declared him capable of taking; that is, preſerved a contingent remainder to him; yet that infant has no legal remedy; nor after his birth can he bring *trover*. This court then interpoſes, becauſe the law does not. When the legal remedy about waſte was eſtabliſhed, no ſuch thing was known in the law, as a contingent remainder, which might not be deſtroyed by the tenant for life, and firſt owner of the inheritance. It was of no value at all, and then why ſhould part be preſerved? Which was the ground of the determination in *Udall* v. *Udall*, and 1 *Rol. Ab.* 119. This limitation being for years could not then exiſt at all, as there muſt be a freehold to ſupport the contingent remainders: but it is now allowed; being introduced at the time of the troubles about 1640, by Sir *Geoffery Palmer*, who invented it for preſervation of contingent remainders: but no legal remedy is adapted to it. The court then will act on the ſame principles as in executory deviſes, which are very like this, being a limitation to to ariſe on contingency. Where indeed there are no truſtees to preſerve, *&c.* this court would not grant an injunction to ſtay waſte againſt tenant for life, and firſt owner of the inheritance, who by the rule of law may, notwithſtanding the contingent remainders, do what they will with the whole eſtate, and then may with part of it; this court not relieving againſt a general rule of law. But now ſuch truſtees are allowed and approved of, they muſt execute this truſt, according to the different remedy the conſtitution allows, to preſerve every part of it: ſo that if tenant for life levies a fine, his particular eſtate is forfeited; they ſhall enter: but though they do not, their right of entry ſhall preſerve all the contingent remainders. If he fells timber, there is no remedy at law; they muſt apply to this court; and it is eſtabliſhed, that on an executory deviſe, this court will interpoſe. But they are more emphatically intitled to this here: for the very purpoſe, for which they have an eſtate for life, is to preſerve the contingent eſtate afterward to ariſe; this court conſidering it as an executory truſt: ſo that if they had brought a bill, both

(553)

both would have been prevented; becauſe both were doing an injury; the owner of the inheritance in cutting down before it was his day; as in *Evelin*'s caſe; and it would be of very extenſive conſequence, if a court of equity ſhould not interpoſe, when there is no legal remedy adequate. A right without a remedy is a ſoleciſm: this court finds one, as in caſe of infant *in ventre*, of executory deviſes, and where there are temporary impediments. If on ſuch bill by the truſtees, the court would not reſtrain, the argument muſt be given up. None but the truſtees could apply; for though any one may file a bill in name of an infant *in ventre*, conſidered as having exiſtence in many caſes, it is not ſo here: but the truſtees, who have a foundation to go upon, as having a remainder themſelves prejudiced by this act, can alone apply.

If then the truſtees, though ignorance or neglect did not bring ſuch bill, the ſecond conſideration ariſes, whether ſatisfaction ought not to be made now? Should this court ſay, they only enjoin, there is no adequate remedy; for it might be then done by ſurprize. Lord *Barnard* was not only reſtrained, but obliged to make ſatisfaction and reſtore, on the principle that the court would have prohibited him, and that complete juſtice could not otherwiſe be made. Where trees are cut down ſpecific ſatisfaction cannot be decreed: it then is only by way of compenſation, by damages. A bill to ſtay waſte draws after it an account of the waſte committed: if the injunction is diſobeyed, an attachment would iſſue: the terms, on which the court would ſuffer the contempt to be cleared, would be on paying coſts of the contempt, and making ſatisfaction as far as could be; for the commitment is only a mean, and otherwiſe no one would value riſking the contempt. It is a maxim, that neither infant or perſon unborn can ſuffer by lacheſs of truſtee, or of the perſon who ought to act: but the doctrine contended for would put their fate in the power of theſe truſtees. If truſtees join in deſtroying contingent remainder, it would take effect at law; but this court would ſet it up again; and if it got into the hands of purchaſer without notice, would make tenant for life, and every one who joined, make ſatisfaction. If indeed the trees were blown down, or cut by wrong or treſpaſs, without permiſſion of the owner of the inheritance, the property would *ex neceſſitate* be the defendant's; as it cannot be in abeyance, and the ſeverance was without default: there would be nothing, of which this court can lay hold againſt his conſcience. *Whitfield* v. *Bewit*, as in 3 *P. Will.*

P. Will. is no authority in the preſent caſe. On ſearching the *regiſter* it appears indeed, that there were truſtees: but the court did not go on that: the objection was not taken, nor did the argument proceed on it. If no ſatisfaction can be obtained for this, timber may be deſtroyed and mines opened on every eſtate contrary to intent of the makers of the ſettlement, and of every one intitled under it, except firſt owner of the inheritance, who may deſtroy the whole, or work the mines barely on conſent of a common farmer for life by colluſion with him, or *ex vi* if he does not agree: an action for the loppings and ſhade could be only brought by the tenant; which it would be worth while to pay on a wooded eſtate. There are few eſtates in *England* which are not let for years; and the firſt owner of the inheritance (although his remainder is very remote) may, by joining with ſuch tenant, ſtrip the eſtate; for *treſpaſs* or waſte cannot be brought againſt him: this argument *ab inconvenienti* is the ſtrongeſt at law as well as equity. As therefore the law allows theſe contingent limitations to be made and preſerved, and moſt lands in the kingdom are ſo ſettled, and the intent of the parties is to preſerve the timber as well as the reſt, and as there is no legal remedy, this court will find one; which will not be adequate, if ſatisfaction is not made, after the act is done. This therefore is not a particular caſe, but a very general and univerſal one.

For defendant was cited *Claxton* v. *Claxton*, 2 *Ver.* 152, and *Aſpingal* v. *Lee*, 2 *Ver.* 218, and that if the parties were diſabled from ſevering the timber, it might be kept too long on the eſtate, and reſt in ſuſpence for ſeveral years to the detriment of the public. (555)

Lord Chancellor took further time to conſider of it; and Sir *John Hind Cotton* having died pending the ſuit, and the cauſe revived againſt his repreſentatives, his Lordſhip gave judgment 5 *Feb.* 1753.

The foundation of the plaintiff's equity depends on the truſt to preſerve the contingent uſes. There was a plain fraud in the agreement to injure the contingent remainders: there is a privity between the tenant for years and remainder-man, the tenant for years being a *Fiduciary*.

Four queſtions are to be conſidered. Firſt the intent of limitations to truſtees to ſupport contingent remainders? Second, what eſtate they take at law, and what actions they

they may bring? Third, the nature and extent of the truſt in equity? Fourth, how charged in equity for breach of truſt? As to the firſt queſtion, they took riſe from *Chudleigh*'s caſe, 1 *Co.* 120, and *Archer*'s caſe, 1 *Co.* 66: but not in practice till the uſurpation. The diſpute in *Chudleigh*'s caſe was the power to deſtroy contingent uſes, before *ceſtuy que uſe* was in being; it was not determined, that the conveyance by *ceſtuy que uſe* for life would bar the contingent remainders, but it was afterward determined in *Archer*'s caſe, very properly ſet forth by *Pollexfen* in *Hales* v. *Riſley*. As to the ſecond, it was a queſtion, whether they took any eſtate or only right of entry: but it was ſettled in *Cholmley*'s caſe, 2 *Co.* 51 *a.* ſo is 41 *E.* 3. and *Fitzherbert*; and *Duncomb* v. *Duncomb*, 3 *Lev.* 437, which laſt was the firſt caſe, where a limitation to truſtees came in queſtion. If then it was ſo ſettled upon a limitation for life, it is ſtronger after a limitation for years; as was well urged by *Lee*, *Chief Juſtice*, in *Smith* v. *Parkhurſt*, *Michaelmas* 14 *G.* 2. They have therefore in law an intereſt in the timber by the enjoyment of it in the tenant for years: but they could not bring *waſte* at common law, and the ſtatute of *Glouceſter* gives it only to thoſe who have intereſt in the inheritance. Thirdly, theſe truſts are to be conſtrued in the moſt liberal manner agreeable to natural juſtice; as in *Manſel* v. *Manſel*. The deſtruction of timber or mines may more affect the inheritance than any other. It is ſaid, they cannot bring a bill to ſtay *waſte*, they only can enter: but that is preſerving the ſhell, and not the kernel. The words comprehend all remedies in law and equity; for equity being now part of the law of the kingdom, is comprehended. They may bring a bill to ſtay waſte before the contingent uſes come *in eſſe*. *Dayrell* v. *Champneſs*, *Eq. Ab.* 400, their truſt affects their conſcience. The ſame bill may be for an infant *in ventre*, which is ſtronger, *Muſgrave* v. *Parry*, 2 *Ver.* 711. Therefore the truſtees might have brought this bill in this caſe; if ſo, the parties would be diſcharged only upon the terms of making ſatisfaction in damages, to be laid up till the contingent uſes ſhould come *in eſſe*. As to the fourth, in *Pye* v. *George*, *Mich.* 1710, truſtees joining in deſtroying contingent remainders is a breach of truſt, and the eſtates created are void. *Tippen* v. *Pigot*, *Mich.* 1713; and *Manſel* v. *Manſel*, the truſtees ſhall be obliged to make a recompence, and the alienee reſtore the eſtate. The difference here is, there is no poſitive act, but only a lacheſs in not bringing a bill for injunction: but they, who have profited by the deſtruction, are not excuſeable. Notice of the truſt makes the

Riſe and intent of truſtees to preſerve contingent remainders,

They have more than a right of entry.

2 Wil. 678. Conſtrued liberally. May bring bill to ſtay waſte before contingent uſes *in eſſe*. So for infant *in Ventre*.

(556)

3 Wil. 128.

3 Wil. 359. cited, Eq. Ab. 385.

Joining to deſtroy the remainders a breach,

the lacheſs of the truſtees to affect them; and notice of the truſt affects the alienees; therefore as in alienation with notice, a reconveyance is juſt, ſo here though before the contingent remainder-man be in *rerum natura*, and had no *jus in re* nor *ad rem*. The objection for the defendant, that the limitation to the truſtees does not alter the power of tenant for life, aſſumes too much. The invention was to abridge the legal rights of tenant for life, and of the remainder-man to take a ſurrender. According to 2 *Wil.* 240, and *Aleyn* 82, the right in law is, that as ſoon as they are ſevered, the veſt in the remainder-man, and *trover* lies; but this was a colluſion with the remainder-man. Where a legal right is acquired by colluſion, this court ſhall enjoin or give a recompence. I will adhere, as far as I can, to the rule *æquitas ſequitur legem*; though till the remainder is veſted, no action of waſte lay, yet a remedy is given. *Page*'s caſe, 5 *Co.* 76, *b.* and if the eſtate be diveſted, and afterward reveſted, he may bring *waſte*, 1 *Inſt.* 356. *a.* The ſucceſſor of a biſhop may maintain *waſte*, for waſte after death of his predeceſſor, when the freehold is in the King. *Fitz. N. B.* 1 *Inſt.* 356. *a.* it may be ſaid, this is by the ſtatute of *Marlbridge*; but I hold it not: and ſo ſays 2 *Inſt.* 151, 152, and 29 *E.* 3. 15 *b.* 2 *H.* 4. 2 *Rol. Ab.* 824. A court of equity has gone further in reſtraining waſte than the law. *Moor* 554. 1 *Rol. Ab.* 377. 1 *Ver.* 23. 2 *Sho.* 69. 2 *Freem.* 54, 55, 278. *Abrahal* v. *Bubb*, and a ſtronger caſe of Lady *Evelyn* there cited. On the ſame foundation I determined *Fleming* v. *Fleming*, 19 *July* 1744, and *Robinſon* v. *Litton*, 12 *December*, 1744, went further. It is objected, that no recompence will be decreed upon a bill now brought for an account, and the caſe of *Jeſus College* v. *Bloom*, 19 *November*, 1745, was cited; but that is widely different from the preſent; and 2 *Wil.* 240, is cited: the diſtinction ariſes from the colluſion between the remainder-man, and tenant for years. As to the length of time, no lacheſs in the plaintiff, and the law gives *waſte* after a meſne remainder-man is dead; beſide the plaintiff ſubmits to what is in the anſwer. An objection occurs to me, that there is a recovery, which has altered the remainder. I admit 1 *Inſt.* ſays, regard is to be had to the continuance of the reverſion in the ſame ſtate: but there is no new uſe created; and it was determined to be the ſame eſtate in Lord *Derwentwater*'s caſe, and *Abbot* v. *Burton*, 2 *Sal.* 590, and in another caſe, *Hil.* 16 *G.* 2. affirmed by the Lords. In this caſe the plaintiff is intitled to the ſame relief; although the remedy at law ſhould be extinguiſhed. There are

and liable and lienee with notice affected.

Waſte reſtrained in equity, where not at law.

Ante cited.

The ſame eſtate after recovery.

Relief in equity, where *Actio moritur cum perſonâ.*

are many inſtances, where a court of equity has relieved in caſes, where the action dies with the perſon. Before the ſtatute of *William* and *Mary* there was no remedy at law againſt executor of an executor for a *devaſtavit*, yet a court of equity did this before. *Price* v. *Morgan*, 2 *C. C.* 217. and the caſe of *Eaton College*, 1 *C. C.* 121. and 2 *Mod.* 293, 294. In all caſes of fraud the remedy never dies with the perſon, but will follow the eſtate of the party liable to the demand. Here the will appearing on the face of the articles proves they had notice: and therefore it was a fraud with the remainder man. Arguments *ab inconvenienti* have been urged: but thoſe on the part of the defendant are not ſo great as thoſe on the other ſide. *Fermor*'s caſe, 3 *Co.* 79. truſtees to preſerve contingent remainders, are a proper *medium* between perpetuities, and too great licence of power over eſtates.

In caſes of fraud, the remedy dies not with the perſon.

Decree for the plaintiff. That the defendant ſhall pay the ſum in his hands, as appears by his anſwer, but without intereſt further back than the time of filing the bill.

N. The judgment *ex relatione.*



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Articles and ſettlement in purſuance and in the very words thereof, both before marriage, under which huſband would be tenant in tail; will be rectified

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TENANTS in COMMON.

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USURY.

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Will, before the late mortmain act, teſtator dying after it, good. 33

Claimant under a will, muſt admit the whole. 122

A. makes *B.* executor and reſiduary legatee, and by deed of the ſame day veſts 4000*l.* in *B.* to pay an annuity to *A.* for life, and afterward 1000*l.* a-piece to *C.* and *D.* and an annuity to *E.* if they ſurvived, *&c.* It is a voluntary and teſtamentary act, and void againſt the general creditors, within 13 *Eliz.* 127

Difference as to will of perſonal and real eſtate. 141

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Our law as to wills, borrowed from the civil law. 187

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One taking a real or perſonal eſtate under a will, muſt abide by it *in toto.* *Page* 235

Deviſe of all lands and tenements in or near *Fowey*, the will not executed properly to paſs freehold: nor could the leaſehold if any there paſs thereby. 272

A. ſeiſed of freehold and copyhold by a will not properly executed, deviſes all his lands and tenements to a wife and child; and no ſurrender to uſe of the will; the court will not ſupply the defect of ſurrender. *ibid.*

The court will not decree the eſtabliſhment of a will, neither proved or admitted. 274

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Will in general conſtrued from the making, unleſs circumſtances or the tenor of it ſhews it ſhould be from death of the teſtator; but the intermediate time not regarded. 295

A will void as to land; heir at law may notwithſtanding claim a legacy. 306

Lands contracted for by teſtator, conſidered as his in equity, and paſs by general words in his will or otherwiſe, *&c.* after naming particular eſtates. 437

Real eſtate where charged with debts by a will. 496

Where a witneſs to a will was a creditor of teſtator. 503

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MONEY, MORTGAGE, POWER, PROBATE, RENTS AND PROFITS, TENANTS IN COMMON, TRUSTS.

WILL, CONTINGENT.

Deviſe, that if I die before my return from my journey into *Ireland*, my houſe and furniture to be ſold, legacies thereout; the reſidue and all real and perſonal, to his wife and her heirs. He returns to *England*, and has two children, having none before; the diſpoſition and the inſtrument both contingent and eventual; and it not having happened, cannot take place. 189

The inſtrument of a will or codicil may be eventual as well as the diſpoſition; and ſhould not then be proved in court eccleſiaſtical. 190

WILL, REVOCATION OF.

Revocation of a will merely on the words, ſent to law. 32

Revocation of a will. 186, 190

By deviſe to unlawful truſt, the legal eſtate as well as the truſt is void; unleſs part of the truſt is good; for that will ſupport the legal eſtate. 187

A difference in the ſtatute of frauds between the penning of revocations of wills of real and perſonal eſtate. 192

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One witneſs is not ſufficient, if denied poſitively by anſwer. 97

Where but one witneſs againſt an anſwer, the anſwer muſt be a poſitive denial *in toto*, and reſt ſingly thereon. *Page* 125

One merely a witneſs cannot be made defendant for diſcovery of what he is examinable to, unleſs intereſted: but he ought to plead thereto and ſupport it by an anſwer diſclaiming intereſt, and not demur. 426

See WILL.

WORDS.

And, conſtrued *or*. 15

Tranſpoſition of words in a will. *ibid.*

Deviſe of leaſehold after death of wife, to ſon *R.* for ſo many years, *&c.* if then living; but if then living and ſhould then or hereafter have iſſue male, to him abſolutely; otherwiſe over. *R.* dies in the life of the wife leaving a ſon. *And* ſhall be conſtrued *or*, and it belongs to the ſon as repreſentative of *R.* 217

YOUNGER CHILDREN.

Deviſe of 300*l.* to *Elizabeth*, to be paid at twenty-one or marriage, but if ſhe died before, then to the younger children of *Francis*: this extends not to all the younger children, nor to be confined to younger at making the will or death of teſtatrix, but at death of *Elizabeth* before twenty-one or marriage. 111

Where an elder child is conſidered as a younger. 210

Deviſe

Deviſe of land to two ſiſters and their heirs: if either married without conſent, ſhe ſhould have only an eſtate for life: if either died unmarried, *Robert* or his heirs ſhould take it to him and his heirs, paying 500*l.* to the other. *Robert* in life of his two ſiſters, conveys all right, claim, *&c.* therein to his younger ſon, in conſideration of love and affection, and for his advancement, and dies. One ſiſter dies unmarried, the other marries with conſent: the heir at law of *Robert* cannot claim this on payment of the 500*l.* in contradiction to the conveyance.

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Poſſibility aſſignable in equity for valuable conſideration; and love and affection to a child is a conſideration in the ſecond degree, and operates by way of agreement, and will be made good like the caſe of defective execution of a power, or deviſe of copyhold without ſurrender. 411

See LEGACY VESTED.

FINIS.